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## Precedent Times Three: Stare Decisis in the Divided Fifth Circuit

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# PRECEDENT TIMES THREE: STARE DECISIS IN THE DIVIDED FIFTH CIRCUIT

by  
Thomas E. Baker\*

## I.

OCTOBER 1, 1981, will mark a milestone in the history of our federal courts. On that day, the Fifth Circuit Court of Appeals Reorganization Act of 1980 (hereinafter referred to as the Reorganization Act)<sup>1</sup> will divide the "former Fifth Circuit" into two completely autonomous judicial circuits: the "new Fifth Circuit," composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas, and the new "Eleventh Circuit," composed of Alabama, Florida, and Georgia.<sup>2</sup> This Article considers the novel issues of stare decisis raised by this division. The Article begins by establishing an historical context, tracing briefly the evolution of the United States Courts of Appeals and the particular developments leading to the scheduled division. The initial inquiry to be addressed is whether the judges of the two new circuits should consider themselves bound by precedents of the former Fifth Circuit. Enmeshed in the resolution of this issue is the determination of the mechanism by which this goal should be accomplished. What follows is a "prophec[y] of what the courts will do in fact," then, a "more pretentious" proposal for accomplishing the goal is offered.<sup>3</sup> Finally, a "most pretentious" argument is made against this whole approach.

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1. Pub. L. No. 96-452, 94 Stat. 1994 (1980) (to be codified in 28 U.S.C. §§ 1, 41).

2. *Id.* § 10. The appellations used here are those of Congress.

3. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). The predictive approach taken here is intended both to help attorneys and judges perform in their respective roles and to aid the judges on the new courts in their "creative effort in shaping the law," beyond Holmes's notion of day-to-day functioning. See Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 982 n.21 (1977).

## II.

While the apex and the base of the three-tiered federal court system have been relatively stable, the intermediate tier has been in a near constant state of flux. The Reorganization Act is the latest in a long history of significant institutional developments in the federal court system that will be traced. In addition, the legislative division of the Fifth Circuit has its own contextually significant history, which also will be summarized.

## A.

Important historical developments in the intermediate federal court mark major evolutionary stages of the federal court system.<sup>4</sup>

Article III of the Constitution settled the debate whether Congress could establish a federal court system.<sup>5</sup> The "transcendent achievement"<sup>6</sup> of the First Judiciary Act<sup>7</sup> has been considered to be the establishment of "the tradition of a system of inferior federal courts."<sup>8</sup> From the beginning, the federal court system has had three tiers, with the federal district courts at the base, the Supreme Court at the apex, and the circuit courts at the intermediate level. Section 4 of the Judiciary Act of 1789 created the original version of the middle tier, with three circuits encompassing the thirteen district courts.<sup>9</sup> While the district courts were exclusively trial courts, the circuit courts were empowered with both original and appellate jurisdiction.<sup>10</sup> The circuit courts' original jurisdiction included all matters not ex-

4. While an appreciation for the broad contours of federal judicial history is necessary background for considering the issues raised here, a detailed survey is beyond the scope of this Article. The classic history of the federal judiciary is F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1927). See generally 13 *CYCLOPEDIA OF FEDERAL PROCEDURE* §§ 56.14-.17, 56.48-.52 (rev. ed. 1977); 1 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶¶ 0.1-.7 (2d ed. 1980); 13 *FEDERAL PRACTICE AND PROCEDURE* §§ 3501-3510 (1975); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; R. RICHARDSON & K. VINES, *THE POLITICS OF FEDERAL COURTS* (1970); Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROB. 3 (1948); Manton, *Organization and Work of the U.S. Circuit Court of Appeals*, 12 A.B.A.J. 41 (1926); Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214 (1963).

5. U.S. CONST. art. III, § 1 vests the federal judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. I, § 8, cl. 9 gives Congress the power "[t]o constitute Tribunals inferior to the supreme Court." For an account of the judiciary in the colonies and under the Articles of Confederation, see H. BOURGUIGNON, *THE FIRST FEDERAL COURT* (1977); R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 72-105 (1941); Frank, *supra* note 4, at 4-9; Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503 (1976).

6. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 4.

7. Act of September 24, 1789, ch. 20, 1 Stat. 73.

8. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 4. The legislative history of the Act is detailed in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). For a detailed account of the formative period (1787-1801) under the Act, see generally D. HENDERSON, *COURTS FOR A NEW NATION* (1971).

9. Act of September 24, 1789, ch. 20, § 4, 1 Stat. 73, 74. Special provisions were made for Maine and Kentucky. *Id.* § 10.

10. *Id.* § 11.

clusively reserved for the district courts,<sup>11</sup> which included the more serious criminal offenses and, when the amount in controversy exceeded five hundred dollars, diversity cases and cases in which the United States was a party.<sup>12</sup> The circuit courts also had appellate jurisdiction to review decisions of the district courts both in civil cases in which the amount of controversy exceeded fifty dollars and in admiralty cases in which the amount in controversy exceeded three hundred dollars.<sup>13</sup> Although vested with some constitutionally ordained original jurisdiction, the Supreme Court was then the principal appellate court in the federal system, with jurisdiction to hear appeals from the circuit courts.<sup>14</sup> The circuit courts were therefore the principal federal trial court.<sup>15</sup>

This three-tiered structure remains today, although the jurisdictional content of each of the tiers has undergone significant change. At the apex, the Supreme Court has seen minor changes in its jurisdiction, terms of court, and number of Associate Justices.<sup>16</sup> At the base, the principal change at the district court level has been a marked increase in members.<sup>17</sup> The most noteworthy functional developments in the federal court system, however, have been the byproducts of institutional changes in the middle tier.<sup>18</sup> The Reorganization Act is merely the latest in a long line of such developments, which mark the major evolutionary stages of the entire system.

A congressional preoccupation with the middle tier has been part of the federal court tradition. This preoccupation began almost at once, as the circuit court was immediately considered the most "inferior"<sup>19</sup> of the three levels. At this time, the circuit courts had no judges of their own; instead, two Supreme Court Justices and a district court judge sat as a panel.<sup>20</sup> Members of the Supreme Court, the bar, and litigants were opposed to this both in theory and in practice. Because of the harshness of travel, panels often could not sit, which meant that both appellate and original cases had

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11. The district court was granted exclusive jurisdiction in admiralty cases, minor criminal offenses, and a few other limited areas. *Id.* § 9.

12. *Id.* § 11.

13. *Id.*

14. *Id.* § 13. The Supreme Court also could reexamine a case decided by the district court and reviewed by the circuit court. *Id.* §§ 21-25. Even so, no appeal was provided for in criminal cases and there were jurisdictional amounts required for an appeal to the Supreme Court. *Id.*

15. While the jurisdiction of the district courts was increased from time to time, their importance never rivalled that of the circuit courts. Surrency, *supra* note 4, at 216. See generally Zobel, *Those Honorable Courts—Early Days on the First First Circuit*, 73 F.R.D. 511 (1977).

16. See generally HART & WECHSLER, *supra* note 4, at 36. See generally *id.* at 35-45; F. FRANKFURTER & J. LANDIS, *supra* note 4.

17. From the original 13 judges in 13 districts (Act of September 24, 1789, ch. 20, § 2, 1 Stat. 73), the number of districts has grown to 95, the most recently created being the District Court for the Northern Mariana Islands. 48 U.S.C. §§ 1694-1694e (Supp. III 1979). The Omnibus Judgeship Act of 1978 raised the total number of district judgeships to 507. 28 U.S.C. § 133 (Supp. III 1979); see text accompanying notes 107-19 *infra*.

18. See text accompanying notes 61-69 *infra*.

19. "Inferior" is, of course, the Constitution's term. U.S. CONST. art. III, § 1.

20. Act of September 24, 1789, ch. 20, § 4, 1 Stat. 73, 74.

to be postponed until the next term of court.<sup>21</sup> Although a 1793 statute lessened the travel burden for Supreme Court Justices by providing that one Justice and the district court judge could sit as a circuit court, that Act created the new problem of a divided bench.<sup>22</sup>

Motivated equally by political expediency and genuine concern for the federal judicial system, Congress passed the famous, short-lived "Law of the Midnight Judges" Act in 1801.<sup>23</sup> Under the 1801 Act, special circuit judges would be appointed to sit in panels of three in the six newly numbered circuits. Opponents' main criticism of the 1801 Act was political: it nearly doubled the number of federal judges, and all of the new appointees would be Federalists.<sup>24</sup> Reacting to this court packing and the judicial attitudes of President Adams's appointees,<sup>25</sup> the new Jeffersonian Congress passed another Judiciary Act in 1802.<sup>26</sup> The 1802 Act essentially returned the circuit court to its status under the First Judiciary Act,<sup>27</sup> with one Justice and one district court judge sitting on each of the six circuit courts. The 1802 Act, however, authorized a single district judge to sit as a circuit court. As the number of circuit court sittings increased to accommodate more districts, circuit riding became "a duty of imperfect obligation"<sup>28</sup> because of the hardships involved and the Justices' personal resistance. The significant reforms of the 1801 Act, abolishing circuit riding and creating circuit court judgeships, were lost.<sup>29</sup> Although a Justice need not sit on each circuit court, under the 1802 scheme the creation of a new circuit would require a new Associate Justice. The short-lived 1801 Act had provided the flexibility of creating circuit judgeships independently of the

21. D. HENDERSON, *supra* note 8, at 41-44; Surrency, *supra* note 4, at 217.

22. Act of March 2, 1793, ch. 22, 1 Stat. 333. The statute seemed to formalize what had become the existing practice. The 1789 statute established a quorum of two, and most circuit courts sat with only one Supreme Court Justice. Surrency, *supra* note 4, at 219.

23. Act of February 13, 1801, ch. 4, 2 Stat. 89. See generally F. FRANKFURTER & J. LANDIS, *supra* note 4, at 21-30; HART & WECHSLER, *supra* note 4, at 36-37; Surrency, *supra* note 4, at 219-21; Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53 (1958); Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

24. Surrency, *supra* note 4, at 220.

25. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 27-28. The controversy gave rise to the landmark case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

26. Act of April 29, 1802, ch. 31, 2 Stat. 156, as amended by Act of March 3, 1803, ch. 40, 2 Stat. 244. This repeal raised no small constitutional question. See F. FRANKFURTER & J. LANDIS, *supra* note 4, at 26-28 n.75. Despite the tenure granted to federal judges in U.S. CONST. art. III, § 1 and art. II, § 4:

"A repeal was a [*sic*] promptly acceded to by the councils of the nation, and a newly created host of judges stripped of their salaries, their offices, and their honors, before time had been given them to enjoy, or even taste the delicious flavor of the dainties which had been placed before them—to warm the seats on which they had been placed, or to be warmed by the ermines with which they had been enshrouded."

Surrency, *supra* note 4, at 220-21 (quoting 8 T. BENTON, ABRIDGEMENT OF THE DEBATES OF CONGRESS 160-61 (1850)). The opposition might not have been so intense, nor repeal so swift and sure, had President Adams not sought to appoint all the newly authorized judges. Surrency, *supra* note 4, at 220.

27. See text accompanying notes 8-15 *supra*.

28. HART & WECHSLER, *supra* note 4, at 37.

29. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 32.

number of Supreme Court Justices. The loss of this flexibility resulted in nine decades "of near-unanimous recognition of the inadequacy of the judicial system, of interminable debate about remedies, and of long-delayed and meager action."<sup>30</sup>

Western expansion brought new states into the Republic and increased the demands on the federal court system. A seventh circuit was created for Kentucky, Tennessee, and Ohio in 1807.<sup>31</sup> This required a new Associate Justice to preside in the new circuit. Because the number of Supreme Court Justices was determined by the number of circuit courts, Congress avoided change at the circuit court level for twenty years; new states simply were not brought into the circuit court system. By 1837 the nation's needs had gone unremedied so long as to create compelling momentum.<sup>32</sup> In that year, Congress increased the membership of the Supreme Court to nine and redivided the country into nine circuits,<sup>33</sup> including eight states that previously had been outside the circuit court system.<sup>34</sup>

Unfortunately, the 1837 Act proved to be too little, too late. The "long delayed plan for relief had become antiquated by events,"<sup>35</sup> as the circuit system began to crumple under the pressing burden of increased Supreme Court and circuit court caseloads.<sup>36</sup> Debate and consideration of legislative proposals amending or abolishing the circuit court system began anew. Three decades of ineffective congressional tinkering with the circuit courts accomplished little, but increased the momentum for reform.<sup>37</sup>

As the Civil War approached, judicial reform was put aside, only to emerge after the war as a vigorous aspect of the new postwar nationalism. The seed of autonomy for the circuit courts, however, was planted before the Civil War. In 1855 California became the new tenth circuit,<sup>38</sup> to which Oregon and Nevada were added in 1863.<sup>39</sup> Of more significance, between 1855 and 1863 a separate circuit judgeship was created; not until 1863 was

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30. HART & WECHSLER, *supra* note 4, at 37.

31. Act of February 24, 1807, ch. 16, 2 Stat. 420, *as amended by* Act of March 22, 1808, ch. 38, 2 Stat. 477, *and* Act of February 4, 1809, ch. 14, 2 Stat. 516.

32. See F. FRANKFURTER & J. LANDIS, *supra* note 4, at 36-50.

33. Act of March 3, 1837, ch. 34, 5 Stat. 176.

34. Alabama, Arkansas, Illinois, Indiana, Louisiana, Michigan, Mississippi, and Missouri had been independent districts prior to this enactment. See Chronological Table, Appendix, *infra*.

35. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 49.

36. For a discussion of the hardships of circuit riding during this period, see *id.* at 49-50 n.163; Surrency, *supra* note 4, at 221-23. But see Mosk, *Recycling the Old Circuit System*, 27 S.C. L. REV. 633 (1976).

37. In an attempt to cope with the Supreme Court's backlog, Congress frequently added a month to the Court's term. See, e.g., Act of May 4, 1826, ch. 37, 4 Stat. 160; Act of June 17, 1844, ch. 96, 5 Stat. 676. See generally F. FRANKFURTER & J. LANDIS, *supra* note 4, at 50-55. In 1842 the circuits were reorganized once again. The existing fifth circuit was absorbed into the fourth and sixth circuits, and Alabama and Louisiana were carved out of the ninth circuit to form a reconstructed fifth circuit. Act of August 16, 1842, ch. 180, 5 Stat. 507. See Chronological Table, Appendix *infra*.

38. Act of March 2, 1855, ch. 142, 10 Stat. 631.

39. Act of March 3, 1863, ch. 100, 12 Stat. 794, *as amended by* Act of February 19, 1864, ch. 11, 13 Stat. 4.

a tenth circuit Justice added to the Supreme Court.<sup>40</sup> This ad hoc treatment for the tenth circuit would prove portentous.

In 1862 the states that had been admitted since the 1837 rearrangement were assigned to circuits<sup>41</sup> by enlarging the ten existing circuits rather than by increasing the number of circuits and Justices.<sup>42</sup> During the Civil War circuit court sessions were not held in the southern states. Recognition of the need for fundamental restructuring of the federal court system increased during the period from 1865 to 1891, as did pressure to eliminate the circuit duties of the Justices and establish an intermediate appellate court to relieve the Supreme Court's burden.<sup>43</sup> In 1866 Congress once again rearranged the districts, this time forming nine circuits.<sup>44</sup> In order to prevent President Johnson from filling Supreme Court vacancies, the 1866 Act reduced the number of Supreme Court Justices to seven.<sup>45</sup> Although the number of Justices was restored to nine only three years later,<sup>46</sup> the 1866 Act was a second important statutory precedent for circuit court autonomy<sup>47</sup> because it revived to a limited extent the 1801 Federalist approach.<sup>48</sup> In the 1866 Act Congress created one circuit judgeship for each of the nine circuits and reduced Supreme Court Justice circuit riding to a symbolic minimum of once every two years.

The period between 1870 and 1891 has been described aptly as "the nadir of federal judicial administration."<sup>49</sup> Geographical expansion, population increase, and commercial development all contributed to a post-Civil War increase in federal court litigation, which was compounded by congressional extensions of jurisdiction. The federal judicial system, ill-equipped to handle the pre-Civil War demands on its resources, nearly ground to a halt during this post-war period, buried in work.

In 1875 Congress conferred federal question jurisdiction upon the federal courts, restricted only by the requirement for an amount in contro-

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40. *Id.*

41. Act of July 15, 1862, ch. 178, 12 Stat. 576.

42. The year after the general rearrangement, Indiana was shifted from the seventh circuit to the eighth circuit. Act of January 28, 1863, ch. 13, 12 Stat. 637. For a Civil War vintage account of the circuit courts, see generally A. CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 83-174 (4th ed. 1864).

43. See note 64 *infra*. The intense political, social, and economic forces at work during this period are described in F. FRANKFURTER & J. LANDIS, *supra* note 4, at 56-77.

44. Act of July 23, 1866, ch. 210, 14 Stat. 209.

45. The legislative branch distrusted the judiciary as well, going so far as to withdraw a grant of jurisdiction over a pending Supreme Court appeal. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868). See generally Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973).

46. Act of April 10, 1869, ch. 22, 16 Stat. 44. The number of Justices has remained at nine until today, being challenged seriously only by President Roosevelt's celebrated court-packing plan. See generally HART & WECHSLER, *supra* note 4, at 41-45.

47. The 1855 California experience was the first statutory precedent. See text accompanying notes 38-40 *supra*.

48. See notes 23-30 *supra* and accompanying text.

49. HART & WECHSLER, *supra* note 4, at 39.

versy.<sup>50</sup> The immediate result was "a flood of litigation utterly beyond the existing capacity of the courts to handle."<sup>51</sup> Between 1870 and 1880 the Supreme Court caseload nearly doubled, and by 1890 the Court had nearly three times its 1870 caseload.<sup>52</sup> The influx of Supreme Court cases reflected the enormous increase in the number of cases heard in the circuit courts and district courts.<sup>53</sup> Ultimately it became apparent that the situation was unlikely to improve and that a drastic remedy was in order.<sup>54</sup>

A political stalemate, however, delayed congressional attempts to cope with the federal courts' crisis. The House approach was to restrict federal court jurisdiction in a manner consistent with southern and western concern for curtailment of federal court power. The Senate, on the other hand, sought to remedy the problem by adding to the capacity of the courts.<sup>55</sup> While this legislative stalemate developed, the intermediate tier had become virtually ineffectual due to congressional tinkering and the practical realities of the court system as it then was structured. By 1890 the statutory duty of Justices to ride circuit had become "Pickwickian,"<sup>56</sup> and for the ten circuit judges to hold sittings in the sixty-five court districts was equally impossible.<sup>57</sup> Because the circuit court jurisdiction was partly appellate in nature, the absence of a circuit judge or a Justice left the district judge alone to review a judgment the same judge had entered.<sup>58</sup> Additionally, Congress had enacted a patchwork of jurisdictional changes that resulted in insulating from review the circuit court's original decisions in all but the most serious cases. As a result, an appeal from a district court

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50. Act of March 3, 1875, ch. 137, 18 Stat. 470. This expansion is discussed in F. FRANKFURTER & J. LANDIS, *supra* note 4, at 65.

51. HART & WECHSLER, *supra* note 4, at 39.

52. For the 1870 term the Supreme Court docket listed 636 cases. During the 1880 term, 1212 cases were docketed. The number of cases grew to 1816 by 1890. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 60.

53. An 1873 backlog of 29,013 cases had swelled to 38,045 in 1880. By 1890 there were 54,194 such cases waiting to be heard. *Id.*

54. Efforts to stem the tide had negligible effect. For example, the repeal of the Bankruptcy Act seemed to have no effect on the mounting case load. *Id.* Legislation that might have eased the pressure on the circuit courts and district courts was offset by Congress's creation of new federal jurisdiction. Compare Act of March 3, 1887, ch. 373, 24 Stat. 552, corrected by Act of August 13, 1888, ch. 866, 25 Stat. 433 (minor restrictions on jurisdiction), with Act of March 3, 1887, ch. 359, 24 Stat. 505 (district courts given additional concurrent jurisdiction over claims against the United States).

55. HART & WECHSLER, *supra* note 4, at 40. An account of the legislative maneuvering during this period is provided in F. FRANKFURTER & J. LANDIS, *supra* note 4, at 86-102.

56. Hill, *The Federal Judicial System*, 12 A.B.A. REP. 289, 302 (1889), quoted in F. FRANKFURTER & J. LANDIS, *supra* note 4, at 87 n.140. Justices were required to sit on the Supreme Court for nine months and to ride circuit the remainder of the year. *Id.*

57. A tenth circuit judge had been added in 1887 to sit in the second circuit. Act of March 3, 1887, ch. 347, 24 Stat. 492.

58. This development was incompatible with the philosophy of the federal courts. The First Judiciary Act had adopted the notion of having an appellate judge sit on the reviewed court, but specifically provided "no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision." Act of September 24, 1789, ch. 20, § 4, 1 Stat. 73, 74. See D. HENDERSON, *supra* note 8, at 23 n.11. Contemporary opinion condemned this development as well: "Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published decision." Hill, *supra* note 56, at 307.



more likely than not would be wasted effort. Furthermore, in most circuit court original proceedings the litigant was not even permitted to make the attempt.<sup>59</sup>

At last, in the Circuit Court of Appeals Act of 1891, commonly known as the Evarts Act,<sup>60</sup> Congress made a long overdue structural change in the federal courts which, as before<sup>61</sup> and since,<sup>62</sup> was performed on the middle tier of the system. The Evarts Act was the first significant structural modification in the courts since the establishment of the federal judicial system.<sup>63</sup> The Act retained much of the system's original structure while providing meaningful relief for the over-burdened courts. The Act created a circuit court of appeals for each circuit.<sup>64</sup> The circuit court of appeals was to be composed of an additional circuit judge, who would hear appeals from the district courts and circuit courts together with the circuit judge under the 1866 Act<sup>65</sup> and either the circuit Justice or a district judge. The Act abolished the appellate jurisdiction of the circuit court, while retaining its original jurisdiction. The Act further decreed that a judge who presided at the trial of a case could not hear the appeal.<sup>66</sup> A second review as of right by the Supreme Court was allowed in a variety of cases, subject to an amount in controversy requirement. In the remaining cases, the circuit court of appeals decision was deemed final, and the Supreme Court was authorized to grant review only by a writ of certiorari or by certified question from the circuit court of appeals. The institutionalization of the notion of discretionary review of some decisions of the circuit court of appeals was an innovation that later would prove significant.

Like all legislation involving the structure of the courts, the Evarts Act was subject to two limitations.<sup>67</sup> First, the contemporary nature and activities of society determine the level of demand on the courts, not the internal court organization. Secondly, as is true of all legislation, statutes affecting the courts often have consequences far beyond those foreseen by Congress. While the drafters of the Evarts Act certainly were aware of economic development within this country and abroad, they failed to anticipate the corresponding growth of governmental regulation.<sup>68</sup> New reforms soon would be in order, but for the present, the immediate needs of

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59. See F. FRANKFURTER & J. LANDIS, *supra* note 4, at 87-88.

60. Act of March 3, 1891, ch. 517, 26 Stat. 826.

61. See text accompanying notes 19-34 *supra*.

62. See text accompanying notes 98-119 *infra*.

63. Had it survived, the short-lived Act of 1801 would have been of the same order of magnitude. See text accompanying notes 23-30 *supra*.

64. The narrow purpose of an intermediate court of appeal in a two-tiered appellate system is usually to lessen the caseload pressures on the court of last resort. As caseloads at all levels increase, the intermediate appellate court almost inevitably plays an ever-widening role in the development of the law, serving as a de facto court of last resort in the majority of cases. See generally Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975). The federal appellate courts have followed this pattern. See Parker, *The Federal Judicial System*, 14 F.R.D. 361, 363-65 (1953).

65. See text accompanying notes 43-47 *supra*.

66. See text accompanying note 58 *supra*.

67. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 103.

68. See generally *id.* at 104-28.

the country were met. Federal court dockets soon became more manageable.<sup>69</sup>

By this time, however, any justification for retaining the circuit court had disappeared. In theory, elaborate legal distinctions separated the district court from the circuit court; in reality, the distinctions generated confusion, waste, and abuses.<sup>70</sup> The attempt to save the circuit courts in 1869 by providing circuit judges failed due to the demands of caseload and geography. Under the 1869 Act the norm became a circuit court presided over by a single district judge. Judicial reformers debated between proposals to create an intermediate appellate court and other proposals to abolish the circuit court.<sup>71</sup> These proposals were so interdependent that when Congress accomplished the first in the Evarts Act, the adoption of the second soon followed. The Evarts Act withdrew from the circuit courts their appellate jurisdiction, which had become redundant with the creation of the circuit courts of appeals. This development served only to highlight the redundancy of the circuit court's original jurisdiction; with the advent of a new appellate court, the "more weighty" *nisi prius* circuit court was a "needless safeguard."<sup>72</sup> Finally, as part of "a systematic statement of the structural principles defining the role of the federal courts in the American constitutional scheme,"<sup>73</sup> the circuit courts were abolished in 1911. The circuit courts of appeals were renamed the courts of appeals for the various circuits.<sup>74</sup> This development generally left the district court as the trial court, the court of appeals as the intermediate appellate court, and the Supreme Court as the federal system's court of last resort.

The federal court system has not evolved beyond the 1911 structure.<sup>75</sup> In 1929 a Tenth Circuit was added to the nine created by the Evarts Act by

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69. *Id.* at 108. For a description of the practical functioning of the federal courts under the Evarts Act, see F. LOVELAND, *THE APPELLATE JURISDICTION OF THE FEDERAL COURTS* (1911).

70. Often a presiding judge would open circuit court proceedings, call the docket, and solemnly close court. The same judge would open district court proceedings immediately thereafter, with the same clerk and other court officials in attendance. Breckons, *The Judicial Code of United States with Some Incidental Observations on its Application to Hawaii*, 22 YALE L.J. 453, 457 (1913), quoted in F. FRANKFURTER & J. LANDIS, *supra* note 4, at 128 n. 107.

71. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 128-29.

72. *Id.* at 129. For a discussion of the lingering death of the circuit court between 1891 and 1911, see *id.* at 128-45.

73. *Id.* at 145. Postponed by being caught up in the codification effort, the abolition itself raised some difficult problems that had to be overcome, such as the territorial authority of judges. See generally *id.* at 134-35.

74. Act of March 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087.

75. Numerous major reforms in jurisdiction have occurred since 1911. For example, the famous Judges Bill of 1925 effected a significant reform in Supreme Court jurisdiction. Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936. While not intended as a structural change, the creation of the position of United States magistrate gradually may be developing into a systemic alteration of constitutional dimension. Act of October 17, 1968, Pub. L. No. 90-578, 82 Stat. 1108. See generally Peterson, *The Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62 (1970); Comment, *The Federal Magistrates Act—An Exercise in Article III Constitutionality*, 17 WAYNE L. REV. 1483 (1971). Many provocative structural reorganizations of the federal courts recently have been proposed. See note 77 *infra*.

detaching six states from the Eighth Circuit.<sup>76</sup> The structural changes in the system between 1789 and 1911 demonstrate the congressional preoccupation with imposing middle-tier structural changes while maintaining the stable apex and base. A chronological table charting this preoccupation is set out in the Appendix to this Article.

## B.

The Fifth Circuit Court of Appeals Reorganization Act of 1980 is the latest example of the congressional preoccupation with altering the middle tier of the federal courts. Congress recently has been concerned specifically with the unique problems of the large circuits, those that have experienced such enormous docket growth that their effective functioning has been endangered. The history of the upcoming division provides further background for understanding its significance.

The Fifth Circuit's surfeited docket has been the subject of long and detailed study.<sup>77</sup> The Judicial Conference of the United States was informed in 1963 that its committees on court administration and judicial statistics had agreed on the need for additional judges in the Fifth Circuit, but had disagreed as to the best way in which to accomplish the increase in judgepower.<sup>78</sup> The Conference formed an ad hoc committee to study the geographical organization of the federal courts. In its 1964 report the ad hoc committee recommended a division of the Fifth Circuit into a new fifth circuit composed of Alabama, Florida, Georgia, and Mississippi and a new eleventh circuit composed of Louisiana, Texas, and the Canal Zone.<sup>79</sup> In that year the Judicial Conference initiated a policy of making comprehensive surveys of the business of the circuits and districts every

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76. Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346. See text accompanying notes 289-96 *infra*.

77. The Fifth Circuit leads any discussion of overcrowded dockets of the courts of appeals. As early as 1950, one commentator noted the rising caseload of the Fifth Circuit and suggested splitting it into a new eleventh circuit composed of Alabama, Florida, Georgia, Puerto Rico, and the Virgin Islands, and a new fifth circuit composed of the Canal Zone, Louisiana, Mississippi, and Texas. Wahl, *The Case for an Eleventh Court of Appeals*, 24 FLA. L.J. 233 (1950). For other early commentary with suggested solutions for congested dockets, see generally Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257; Wiener, *Federal Regional Courts: Solution for the Certiorari Dilemma*, 49 A.B.A.J. 1169 (1963); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964). For a novel suggestion for relieving the courts of appeals, see Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981). For a comparative analysis of the Second, Fifth, and District of Columbia Circuits, see J. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981).

78. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, H.R. DOC. NO. 184, 88th Cong., 2d Sess. 65 (1963).

79. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS 14-15 (1964). The report prompted Professor Charles Alan Wright to observe that "[t]he United States Court of Appeals for the Fifth Circuit is at a point of crisis." Wright, *supra* note 77, at 949. In May 1964 then Chief Justice Warren addressed the American Law Institute and urged the passage of corrective legislation. Address by Chief Justice Warren, American Law Institute Annual Meeting (May 20, 1964), quoted in Morgan, *The Fifth Circuit: Expand or Divide*, 29 MERCER L. REV. 885, 886 (1978).

four years. As a result of the 1964 survey and the resulting recommendations, Congress added four temporary judges to the Fifth Circuit in 1966, raising the total number of judges on the court to thirteen.<sup>80</sup> The temporary judgeships were made permanent and two others were added in 1968<sup>81</sup> to "alleviate . . . a crisis situation"; Congress was convinced that the action was necessary and could not await the scheduled 1968 survey.<sup>82</sup>

As serious as the problem had been when originally noted, it only worsened as study and debate lengthened. The parade of horrible statistics lengthened with each new appraisal of the situation.<sup>83</sup> Between 1950 and the mid-1960s, appellate filings in the Fifth Circuit had more than doubled.<sup>84</sup> By the middle 1970s the total was roughly eight times the 1950 level.<sup>85</sup> Congress simply could not add judges fast enough to keep the court afloat.

In 1970 Chief Justice Warren Burger urged that Congress create a commission to study and reexamine the structure of the federal court system.<sup>86</sup> The Judicial Conference of the United States made a similar recommendation in the same year.<sup>87</sup> Responding to the collective urging of the Judicial Conference of the United States, the Federal Judicial Center, the American Bar Association, and the chief judges of all eleven circuits, Congress created the Commission on Revision of the Federal Court Appellate System in 1972.<sup>88</sup> The Commission was charged with conducting a broad

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80. The President was authorized to appoint four judges immediately, with the limitation that the next four vacancies on the court would go unfilled. Act of March 18, 1966, Pub. L. No. 89-372, 80 Stat. 75. See generally S. REP. NO. 782, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2086. The previous increase had occurred in 1961. Act of May 19, 1961, Pub. L. No. 87-36, 75 Stat. 80. See generally H.R. REP. NO. 215, 87th Cong., 1st Sess., reprinted in [1961] U.S. CODE CONG. & AD. NEWS 1729; CONF. REP. NO. 342, 87th Cong., 1st Sess. (1961), reprinted in [1961] U.S. CODE CONG. & AD. NEWS 1743. The docket increase between 1954 and 1961 made it clear that seven years was too long to wait between evaluations. See Act of February 10, 1954, Pub. L. No. 83-294, 68 Stat. 8.

81. Act of June 18, 1968, Pub. L. No. 90-347, 82 Stat. 184.

82. S. REP. NO. 782, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2086, 2087. The court had been operating with the equivalent of 15 judges by arranging for visiting judges to sit. Thus the 1968 legislation did not decrease the Fifth Circuit's caseload per judge, which was then the highest among the courts of appeals. *Id.* at 2089.

83. Reports and statistical summaries abound. See, e.g., notes 77, 80 *supra* and notes 84, 140 *infra*.

84. Gee, *The Imminent Destruction of the Fifth Circuit; Or, How Not to Deal with a Blossoming Docket*, 9 TEX. TECH L. REV. 799 (1978).

85. *Id.* Judge Gee is careful to point out, however, that the workload did not increase eight times in the 25-year period. *Id.*

86. Chief Justice Burger repeatedly has urged Congress to grant meaningful relief to the federal courts. See, e.g., Burger, *1977 Report to the American Bar Association*, 63 A.B.A.J. 504 (1977).

87. S. REP. NO. 117, 95th Cong., 1st Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 3569, 3601.

88. Act of October 13, 1972, Pub. L. No. 92-489, 86 Stat. 807. See generally CONF. REP. NO. 92-1457, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3611. The Senate Report described the caseload explosion and listed some alternative solutions, which included creating more circuit judgeships, dividing circuits, realigning the boundaries of all the circuits, abolishing all circuit boundaries, and creating substantive law divisions in large circuits. S. REP. NO. 92-930, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3602, 3605-06. Congress was convinced that a real crisis could be avoided until 1975, which would give the Commission time to operate. *Id.* at 3610. See generally *Hearings*

study of the federal judicial system's geographical divisions, structure, and internal procedures and with recommending such changes as would be "most appropriate for the expeditious and effective disposition of judicial business."<sup>89</sup>

The Commission conducted extensive hearings<sup>90</sup> and filed its report on the geographical realignment of the circuits in December 1973. Rather than suggesting a complete realignment of the circuits, the Commission recommended that the Fifth Circuit be divided so that Alabama, Florida, and Georgia would be grouped in one circuit and Mississippi, Louisiana, and Texas in another. This recommendation satisfied the Commission's self-imposed criteria: (1) circuits should be composed of at least three states; (2) no circuit should be created that would immediately require more than nine judges; (3) a circuit should contain states with a diversity of population, legal business, and socioeconomic interests; (4) realignment should avoid excessive interference in established circuit alignment; and (5) no circuit should contain noncontiguous states.<sup>91</sup> The Commission also proposed two alternatives: (1) an alignment of Alabama, Florida, Georgia, and Mississippi and a second alignment of Arkansas, Louisiana, and Texas; and (2) an alignment of Alabama, Florida, Georgia, and Mississippi and a second alignment of Louisiana and Texas.<sup>92</sup>

The Fifth Circuit was the obvious starting place for the proposed realignment and reform.<sup>93</sup> Its problems with size and caseload were largest,

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*Before Subcommittee of the House Committee on the Judiciary on H.R. No. 7378, 92d Cong., 1st Sess. (1971); Levin & Fickler, Realignment of the Fifth Circuit: A Necessary First Step, 46 Miss. L.J. 659 (1975).*

89. Act of October 13, 1972, Pub. L. No. 92-489, 86 Stat. 807. In the view of some of those in the best position to know, the Commission was "foredoomed to fail" because it could not consider jurisdictional reforms. Gee, *supra* note 84, at 803; Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980). See generally H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); Sarat, *The Role of Courts and the Logic of Court Reform: Notes on the Justice Department's Approach to Improving Justice*, 64 JUD. 300 (1981).

90. See generally COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *HEARINGS* (1973) [hereinafter cited as 1973 COMMISSION HEARINGS].

91. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973) [hereinafter cited as *Commission on Revision*]. The Commission recognized that the boundaries were "largely the result of historical accident," but declined to recommend nationwide reorganization because of its unsettling effects. *Id.* at 228. The Commission also recommended the division of the Ninth Circuit, a proposal beyond the scope of this Article. See generally Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974). The Commission later issued a second report. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975). This second report suggested a need for a new National Court of Appeals, an idea proposed three years earlier by the so-called Freund Committee under the auspices of the Federal Judicial Center. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1972).

92. *Commission on Revision, supra* note 91, at 233-34.

93. The Commission "harbor[ed] no illusions that realignment [was] a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals." *Id.* at 229. Realigning the Fifth and Ninth Circuits, however, was believed to be a necessary first effort to cope with their "pressing problems." *Id.*

and attempts to alleviate them by appointing more judges<sup>94</sup> and instituting controversial procedural innovations<sup>95</sup> already had been tried. Although its judges were unanimously opposed to adding more judgeships, they had voted overwhelmingly in favor of a split.<sup>96</sup> The inevitability of a backlog was being suggested.<sup>97</sup> The Senate reacted with the introduction of three bills, each tracking one of the three alternatives offered by the Commission.<sup>98</sup> The Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary held hearings on the three bills and received the comments and criticisms of lawyers and judges. The Subcommittee's 1974 draft report proposed an internal reorganization of the Fifth Circuit into two divisions, however, instead of the circuit split approach taken by the Commission and adopted in the three bills.<sup>99</sup>

This so-called internal division approach to the reorganization of the Fifth Circuit was translated into a Senate bill on which hearings were held in 1975.<sup>100</sup> The substituted bill called for internally reorganizing the Fifth Circuit into two divisions: the Eastern Division, with twelve judges, would have included Alabama, Florida, Georgia, and the Canal Zone; the Western Division, with eleven judges, would have included Louisiana and Texas.<sup>101</sup> The two divisions would have had similar caseloads. Each

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94. See notes 80-82 *supra*.

95. See generally Rahdert & Roth, *Inside the Fifth Circuit: Looking at Some of its Internal Procedures*, 23 LOY. L. REV. 661 (1977); Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195 (1980). By the mid-1970s, the Fifth Circuit was deciding approximately 55% of its cases without oral argument. See Rahdert & Roth at 668. See also 5TH CIR. R. 18. It also was disposing of approximately 35% of its cases without a written opinion. See Schuchman & Gelfand, at 220. See also 5TH CIR. R. 21.

96. Despite dramatic increases in caseload, the judges of the Fifth Circuit adopted a resolution in October 1971 against adding judgeships. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS 81-82 (1971). Instead, they favored a split. See S. REP. NO. 117, *supra* note 87, at 20-24; Levin & Fickler, *supra* note 88, at 667-73; *Written Joint Statement of Judges Gewin, Morgan, Clark, Coleman, Godbold, Dyer, Simpson and Bell*, 1973 COMMISSION HEARINGS, *supra* note 90, at 392-95.

97. *Hearings on S. 729 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 37 (1975).

98. See S. 2988-2990, 93d Cong., 2d Sess. (1974).

99. S. REP. NO. 117, *supra* note 87, at 40. Internal reorganization of the circuit into divisions arose as a response to objections to splitting the Fifth Circuit, including a concern over which new circuit would be called the Fifth. Splitting goes against the long-standing tradition of the circuit. See note 91 *supra*. Confused resistance had been expressed for grouping Mississippi with the civil law state of Louisiana and with Texas. Another fear was the creation of an oil and gas law circuit, with Louisiana and Texas dominating one circuit. See Gee, *supra* note 84, at 803-06. The splitting approach also involved the unique problems of the Ninth Circuit, and the problems of dividing one state, California, between two circuits. That proposal died quickly. See Haworth, *Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 SW. L.J. 839, 847 (1976); note 90 *supra*. No bill was reported by the Judiciary Committee of either house in 1973 because the events of Watergate preempted committee activities. S. REP. NO. 117, *supra* note 87, at 8.

100. S. 729, 94th Cong., 1st Sess. (1975). See generally Haworth, *supra* note 99, at 843-54; Levin & Fickler, *supra* note 88. Because of strong resistance to dividing the Ninth Circuit and the State of California, the bill reported favorably by the Committee in December 1975 applied only to the Fifth Circuit. S. 2752, 94th Cong., 1st Sess. (1975). See S. REP. NO. 513, 94th Cong., 1st Sess. at 15 (1975).

101. S. REP. NO. 117, *supra* note 87, at 41. The court had supported division into two

would have had its own chief judge, clerk, circuit executive, and judicial council. The substituted bill supposed some limited continued unity for the new divisions, including a special joint en banc hearing before the most senior judges of the two divisions to settle interpretive conflicts in the decisions of the two divisions, a provision for a single judicial conference, and interdivision assignment of district and circuit judges to accommodate caseload demands.<sup>102</sup> Still, the net effect of the substituted bill was to create two new circuit courts. The substituted bill<sup>103</sup> thus departed from the Commission's recommended proposal in two significant particulars. First, it adopted the Commission's second alternative grouping, with Mississippi aligned with Alabama, Florida, and Georgia.<sup>104</sup> More importantly, the substituted bill created divisions within the Fifth Circuit in lieu of two new, completely autonomous circuits.<sup>105</sup> Despite the pressing need for relief, political inaction in the 94th Congress brought the matter to an anticlimactic close.<sup>106</sup>

Both the House and the Senate in the 94th Congress took up bills realigning the Fifth Circuit. Because each chamber passed a different version, both of which substantially increased the numbers of district and circuit judgeships in the Fifth Circuit and throughout the country, the bills were forced to go to a conference committee.<sup>107</sup> Under the Senate version the Fifth Circuit would be divided into two separate circuits. The fourteen

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autonomous circuits by a vote of ten to three. Two judgeships were vacant. The judges also requested that twelve additional judgeships be authorized and divided ratably between the two new circuits. *Id.*

102. The special en banc was to be used in the event of a "conflict with a decision by the other division of that circuit and affecting the validity, construction, or application of any statute or administrative order, rule, or regulation, State or Federal, which affects personal or property rights in the same State." S. 729, 94th Cong., 1st Sess. (1975).

103. S. 2752, 94th Cong., 1st Sess. (1975) (Fifth Circuit Divisions), *substituted for* S. 729, 94th Cong., 1st Sess. (1975) (Fifth and Ninth Circuit Divisions), *substituted for* S. 2988-2990, 93d Cong., 2d Sess. (1974) (Commission recommended splitting of Fifth and Ninth Circuits). *See* notes 83-85 *supra*.

104. The Commission had propounded even the alternatives as "a significant improvement over the current situation." *Commission on Revision, supra* note 91, at 233.

105. *See* text accompanying notes 90-92 *supra*. While recommending legislation to divide the Fifth Circuit, the Department of Justice suggested that the divisions were really two autonomous circuits and should be designated as such so that all ties between the two would be broken. S. REP. NO. 117, *supra* note 87, at 42. The Louisiana Bar Association also supported creation of two new circuits of three states each. *Id.*

106. Some concern was raised that realignment might affect the conservative or liberal tendencies of the court on certain legal issues, specifically civil rights. The Senate Judiciary Committee found no factual basis for such concern. S. REP. NO. 117, *supra* note 87, at 46 (citing Haworth, *supra* note 99). *See generally* Haworth, *supra* note 99, at 847-54. Partisan politics may have played a role. Congress in 1975 was dominated by Democrats; the White House was Republican, and a presidential election was imminent. While legislation affecting the judicial structure is often nonpartisan, the prospect of wholesale judicial appointments generates intense political interest. F. FRANKFURTER & J. LANDIS, *supra* note 4, at 42.

After the 94th Congress adjourned, judicial statistics for 1976 became available and showed still another increase in case filings. In addition, the Judicial Conference made its quadrennial survey of judgeships and recommended that more be created. S. REP. NO. 117, *supra* note 87, at 8. Various other bills to add judges died during the same session. *Id.*

107. H.R. 7843, 95th Cong., 2d Sess. (1978); S. 11, 95th Cong., 2d Sess. (1977).

judges of the new fifth circuit would hold court for Alabama, Florida, Georgia, Mississippi, and the Canal Zone, and the twelve judges of the new eleventh circuit would do the same for Louisiana and Texas.<sup>108</sup> The House bill would have increased the number of judges in the circuit, but did not provide for splitting the Fifth Circuit.<sup>109</sup>

Once the conference committee began work on the House and Senate bills, profound disagreement immediately became apparent.<sup>110</sup> The Senate plan would have violated the Commission's criteria by isolating two states in a single circuit and creating two new circuits with more than nine judges.<sup>111</sup> Civil rights proponents were concerned that the proposed new fifth circuit would be composed only of more conservative, deep south judges.<sup>112</sup> Concern also was raised that the proposed new eleventh circuit would become an oil and gas circuit.<sup>113</sup>

The conference committee labored long and hard over a compromise. A plan was offered to appoint the additional judges and wait one year after the appointment of the last judge for reports from the court and the Judicial Conference.<sup>114</sup> Another compromise, offered to disarm the civil rights objection, was to create a special forum to decide conflicts between the two new circuits. The special forum was to be composed of the seventeen most senior active judges, nine from the present court, four from the proposed new fifth circuit, and four from the proposed new eleventh circuit.<sup>115</sup> In the closing hours of the 95th Congress, a compromise finally was reached that allowed both sides to claim victory.<sup>116</sup> In addition to creating the new judgeships,<sup>117</sup> section 6 of the statute provided:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and

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108. S. 11, 95th Cong., 2d Sess. (1977). For a dialogue by two Fifth Circuit judges on the merits of S. 11, see Gee, *supra* note 84, and Morgan, *supra* note 79.

109. H.R. 7843, 95th Cong., 2d Sess. (1978); H. CONF. REP. NO. 1643, 95th Cong., 2d Sess., at 9, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 3618, 3618.

110. For an account of some of the compromise efforts, see 36 CONG. Q. WKLY. 1416 (June 3, 1978); 36 CONG. Q. WKLY. 1854 (July 22, 1978); 36 CONG. Q. WKLY. 2579 (Sept. 23, 1978); 36 CONG. Q. WKLY. 2960 (Oct. 14, 1978). See generally Reavley, *The Split of the Fifth Circuit: Update and Finis*, 12 TEX. TECH L. REV. 1, 3-4 (1981).

111. See text accompanying note 91 *supra*.

112. See note 106 *supra*; 36 CONG. Q. WKLY. 2579 (Sept. 23, 1978). For a history of the Fifth Circuit's tradition of courage and its leadership role during the Civil Rights era, see generally F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978); Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149 (1981). See also Fraenkel, *The Function of the Lower Federal Courts as Protectors of Civil Liberties*, 13 L. & CONTEMP. PROB. 132 (1948).

113. See Reavley, *supra* note 110, at 3-4.

114. 36 CONG. Q. WKLY. 1416, 1417-18 (June 3, 1978).

115. 36 CONG. Q. WKLY. 1854 (July 22, 1978).

116. One Senate aide was quoted as saying, "It was a real cop-out by both the House and Senate conferees to get the judgeships and the political patronage. . . . They can interpret it to mean anything they want." 36 CONG. Q. WKLY. 2579 (Sept. 23, 1978) (omissions in original). Congressman McClory, a member of the conference committee, labeled § 6 "intentionally ambiguous language." 124 CONG. REC. H11,471-472 (daily ed. Oct. 4, 1978).

117. A total of 152 district and circuit judgeships were created, the largest number ever established by a single act of Congress. 36 CONG. Q. WKLY. 2961 (Oct. 14, 1978).



staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.<sup>118</sup>

In essence, the committee thus had left initial resolution of the issue to the court itself.<sup>119</sup>

The Fifth Circuit Judicial Council promptly appointed an ad hoc committee to consider this section of the Omnibus Judgeship Act of 1978 and the prospects of internal reorganization into administrative units and revision of the en banc procedure.<sup>120</sup> The court's committee heard the views of each judge on both issues.<sup>121</sup> In June 1979 the Fifth Circuit Judicial Council tabled the matter until more than sixteen active judges were in place, and it was set for consideration at the September 1979 session.<sup>122</sup> At that session, twenty-two active judges debated the issues, and "it became obvious that there were many differences of opinion about what should be done."<sup>123</sup> The majority agreed that the court could not split itself by rule after Congress had rejected the split legislation.<sup>124</sup> Because Congress chose to maintain the Fifth Circuit as one court, it would be governed by one rule of law.<sup>125</sup> As the judges themselves would soon conclude, the congressional decision to maintain one law of the circuit was sound in theory,<sup>126</sup> but so burdensome as to be practically impossible without a division of the circuit.

Continuation of the en banc function after the internal reorganization of the circuit into administrative units threatened to endanger the notion of one law of the circuit. Several proposals were considered to alleviate the

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118. Act of October 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified at 28 U.S.C. § 41 (Supp. II 1978)). Only the Fifth and the Ninth Circuits satisfied the 15-judge requirement. The Ninth Circuit adopted an administrative unit plan, dividing itself into three units on Dec. 10, 1979. After circulating the proposal to interested members of the Ninth Circuit bar, the court also adopted a plan for a modified en banc court consisting of the Chief Judge and ten additional judges to be drawn by lot. Letter from Chief Judge James R. Browning, United States Court of Appeals, Ninth Circuit (May 9, 1980). See 9TH CIR. R. 23, 25. Cf. 28 U.S.C. § 2109 (1976) (if no Supreme Court quorum exists, case is remitted to the court of appeals of origin for final resolution by either the en banc court or a court constituted of the three most senior judges). See generally THE THIRD BRANCH, May 1981, at 1 (interview with Chief Judge Browning).

119. The committee requested reports from the judicial council of the court and the Judicial Conference one year after the appointment of the last judge on "what rules have been implemented . . . how those rules are working, and recommendations for such additional legislation as may be necessary to provide for the effective and expeditious administration and disposition of the business of that court." H. CONF. REP. NO. 1643, 95th Cong., 2d Sess. 9 (1978).

120. Reavley, *supra* note 110, at 4.

121. *Id.*

122. *Id.*

123. *Id.*

124. The Judicial Conference apparently drew support for this conclusion from Congress's use in § 6 of the term "administrative units" rather than "judicial units." *Id.* See Omnibus Judgeship Act of 1978, 28 U.S.C. § 41 (Supp. II 1978).

125. See 124 CONG. REC. S17,515-17 (daily ed. Oct. 7, 1978) (remarks of Sen. Kennedy); 124 CONG. REC. H11,473-74 (daily ed. Oct. 4, 1978) (remarks of Rep. Rodino).

126. See note 134 *infra*.

difficulties presented. One suggestion was that each administrative unit, east and west, have its own en banc court, but this approach raised the problems of whether one en banc court would bind the other and how to resolve conflicts between the two en banc courts. One solution would have created a "grande en banc" from the entire circuit to resolve such conflicts.<sup>127</sup> This proposal ultimately was deemed unacceptable because it would have added another year to the appellate process and would have postponed, not solved, the original problems of a twenty-six-member court.<sup>128</sup>

Because an en banc court of twenty-six judges was deemed a problem in itself, several proposals suggested the creation of a permanent en banc court of a smaller number, selected either by lot or by seniority.<sup>129</sup> This proposal was rejected because it would impair the court's collegiality by establishing classes of judges and would deny nonparticipating judges an important judicial function.<sup>130</sup> Another proposal, which would have provided for random selection of the en banc court for each sitting, failed because a fortuitous selection process could reduce en banc precedent to the "luck of the draw."<sup>131</sup> Such a result would have had serious consequences for the rule of one law for the circuit.

This commitment to maintaining one rule of law in the circuit left few alternatives, and no court consensus could be reached. The September 1979 Judicial Council decided to postpone action under section 6 for one year,<sup>132</sup> but the court soon became impatient with its self-imposed moratorium and reconsidered section 6 at its May 1980 Judicial Council.<sup>133</sup> For the first time, the Council voted unanimously to petition Congress and request the creation of two autonomous circuits.<sup>134</sup> The Judicial Council also arranged the court into two administrative units: Unit A, composed of Louisiana, Mississippi, and Texas, and Unit B, composed of Alabama, Florida, and Georgia.<sup>135</sup> The unity of the en banc court, the judicial conference, and the judicial council were maintained.

The unanimous May 5, 1980, petition from the Judicial Council triggered a quick congressional response. Senate Bill 2830, which would have

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127. Reavley, *supra* note 110, at 5.

128. *Id.*

129. *Id.* at 5-6.

130. The suggestion was made that such a permanent solution would deprive the non-participating judges of their judicial office unconstitutionally without House impeachment and Senate removal. *See id.* *See also* U.S. CONST. art. III, § 1.

131. Reavley, *supra* note 110, at 6.

132. *Id.* at 7.

133. *Id.*

134. The collective sense of the gathering was that this was the only solution. Telephone interview with Chief Judge J.P. Coleman, United States Court of Appeals, Fifth Circuit (May 14, 1980).

135. A committee was appointed to smooth the transition. *Id.*; *see* 5TH CIR. R. 1. Judges of each unit generally were to sit together in panels for that unit, "although the authority of judges to act as members of this Court throughout this circuit shall in no way be diminished." *Id.*

split the Fifth Circuit, passed the Senate on June 18, 1980.<sup>136</sup> House Bill 7665, which ultimately was enacted, created the new Fifth Circuit, composed of the Canal Zone, Louisiana, Mississippi, and Texas, and the new Eleventh Circuit, composed of Alabama, Florida, and Georgia.<sup>137</sup> Testimony at the committee hearings, held in August 1980, unanimously favored the proposals.<sup>138</sup>

The House Report described several reasons for splitting the Fifth Circuit.<sup>139</sup> The committee cited the court's enormity in geography, in population, in docket, and in judgeships as diseconomies of scale.<sup>140</sup> Ironically, the congressional solution of 1978,<sup>141</sup> adding judges, had become the pre-

136. S. 2830, 96th Cong., 2d Sess. (1980).

137. H.R. 7665, 96th Cong., 2d Sess. (1980), was introduced on June 25, 1980. The only difference between H.R. 7665 and S. 2830 was that the Senate version placed the Canal Zone in the new Eleventh Circuit. Both versions divided the states as requested in the Judicial Conference's petition.

138. The following organizations supported the judges' unanimous petition for splitting the court: U.S. Department of Justice; American Bar Association; Commission on Revision of the Federal Court Appellate System; Judicial Council of the Fifth Circuit; Federal Bar Association; National Association of Attorneys General; Attorneys General of the six states within the Fifth Circuit; Delegates from the State of Georgia to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Alabama to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Texas to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Florida to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Louisiana to the Fifth Circuit Judicial Conference, 1980; Delegates from the State of Mississippi to the Fifth Circuit Judicial Conference, 1980; United States Magistrates of the Fifth Circuit; District Judges' Association of the Fifth Circuit (consisting of 110 district judges); Bankruptcy Judges of the Fifth Circuit; Mississippi Bar Association; Florida Bar Board of Governors; State Bar of Georgia; Houston, Texas, Bar Association; Mobile, Alabama, Bar Association; New York Times; and Alabama Black Lawyers Association.

Several influential groups withdrew their prior opposition: American Civil Liberties Union; Lawyers Committee for Civil Rights Under Law; Alabama Black Lawyers Association; and NAACP Legal Defense Fund.

The expressed concern of civil rights supporters for the perpetuation of an all-white judiciary in the south was recognized. The committee, however, deemed the fear overcome by affirmative action guidelines in judicial selection. H.R. REP. NO. 1390, 96th Cong., 2d Sess. 4-5, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4236, 4239-40. See generally *Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on H.R. 6060, H.R. 7665, and Related Bills*, 96th Cong., 2d Sess. (1980) [hereinafter cited as *Hearing on H.R. 7665*].

139. See generally H.R. REP. NO. 1390, *supra* note 138.

140. *Id.* at 2-4. The geographical size of the six states in the Fifth Circuit has not changed since 1891, when it became one of the original circuits. Act of March 3, 1891, ch. 587, 26 Stat. 826. See text accompanying notes 61-66 *supra*. Indeed, modern means of transportation have made riding circuit much less onerous than in the past, albeit much more expensive. See text accompanying notes 17-30 *supra*. Total population in the area covered by the Fifth Circuit now approaches 40 million. The future docket predictions were staggering. H.R. REP. NO. 1390, *supra* note 138, at 2. With the addition of 35 district court judges in the Omnibus Judgeship Bill of 1978, Fifth Circuit filings would have reached 5,380 by 1982. Even with the split, the dockets of each of the two new circuits will be larger than any other circuit except the Ninth: in 1980 the states of the new Fifth Circuit had 2,301 filings and the states of the new Eleventh Circuit had 1,919. Fourteen judges will sit in the new Fifth Circuit; twelve judges will sit in the new Eleventh Circuit. *Id.* at 4 n.9. The committee's principal emphasis was the near impossibility of so many judges functioning as an en banc court, maintaining uniformity in the law of the circuit, and coping effectively with the burgeoning output of so large a court. *Id.* at 3.

141. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified at scattered sections of 28 U.S.C.); see text accompanying notes 103-19 *supra*.

cupitous problem in 1980. Emphasizing the need for “uniformity in the application of the law by the Court,”<sup>142</sup> the committee concluded that more intracircuit conflicts were inevitable with so many multiples of panels. The en banc process, which otherwise would remedy internal conflicts, had become so difficult, time consuming, and cumbersome that its effectiveness had suffered.<sup>143</sup> Thus, because Congress could not agree upon a solution to the circuit’s problems, it had delegated the problem to the court,<sup>144</sup> which itself could not agree upon a unified approach;<sup>145</sup> and the resulting judicial impasse at last precipitated congressional action.<sup>146</sup>

### III.

Consistent with long tradition, traced above, the Congress has continued its preoccupation with the middle tier of the federal judiciary.<sup>147</sup> The Fifth Circuit Reorganization Act of 1980 becomes effective on October 1, 1981.<sup>148</sup> After three decades of debate and study, the Fifth Circuit will be split,<sup>149</sup> leaving three courts where there had been only one. Eventually, two courts will survive: the new Fifth Circuit and the new Eleventh Circuit. Further splitting in other circuits, possibly even in the new Fifth and Eleventh Circuits, ultimately may occur. This milestone in restructuring the federal courts raises some intriguing questions of stare decisis, and in that sense this split will be an experiment. The course of future congressional restructuring of the federal court system may depend upon how well the new courts adapt. The following portion of this Article discusses the role of precedent in the new courts, particularly the viability of former Fifth Circuit precedent in the new Fifth Circuit and the new Eleventh Circuit.

#### A.

The definitional section of the Reorganization Act frames the central inquiry. On the effective date of the Act, three courts will coexist within the confines of the present Fifth Circuit.<sup>150</sup> First, the “former fifth circuit,” defined as “the fifth judicial circuit of the United States as in existence on

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142. H.R. REP. NO. 1390, *supra* note 138, at 3.

143. *Id.*; see note 273 *infra*.

144. See text accompanying notes 103-19 *supra*.

145. See text accompanying notes 120-35 *supra*.

146. Congress has not acted with regard to the Ninth Circuit’s willingness to modify its en banc function. See note 118 *supra*.

147. See generally Part II, section A *supra*.

148. Pub. L. No. 96-452, § 12, 94 Stat. 1994, 1996 (1980) [hereinafter cited as Reorganization Act].

149. See generally Part II, section B *supra*.

150. For a codification of the current geographical division of the circuit courts of appeals, see 28 U.S.C. § 41 (1976). Since the courts of appeals were created in 1891, the Fifth Circuit has been comprised of the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. Act of March 3, 1891, ch. 587, 26 Stat. 826. See text accompanying notes 61-66 *supra*. These six states have been grouped together since 1866 when the circuit courts were reorganized. Act of July 23, 1866, ch. 210, 14 Stat. 209. See text accompanying notes 44-47 *supra* and Appendix *infra*.

the day before the effective date,"<sup>151</sup> will continue to exist in two situations. If the matter has been submitted for decision before the effective date of the Act,<sup>152</sup> or if a petition is made for rehearing or for rehearing en banc in a matter decided or submitted before the effective date,<sup>153</sup> the matter will be processed as if the Act had not been enacted.<sup>154</sup> The "former fifth circuit" will cease to exist on July 1, 1984.<sup>155</sup> If the matter has not been submitted according to these procedures, the Act provides that the former Fifth Circuit shall transfer the appeal or proceeding, along with all supporting documents, to the appropriate new court for complete adjudication, as if it had been filed after the effective date.<sup>156</sup> Secondly, the Act creates the "new fifth circuit," defined as the fifth judicial circuit established by amending its composition to include the District of the Canal Zone, Louisiana, Mississippi, and Texas.<sup>157</sup> Thirdly, the Act establishes the "eleventh circuit," defined as the "newly created"<sup>158</sup> eleventh judicial circuit composed of Alabama, Florida, and Georgia.<sup>159</sup> Thus, at least for a short time and for limited purposes, the former court will continue, to be joined and ultimately replaced by two new courts.<sup>160</sup>

This triennial<sup>161</sup> triptych of tribunals raises three questions of stare decisis. First, will the precedents of the former Fifth Circuit decided before the

151. Reorganization Act, *supra* note 148, § 10(1).

152. *Id.* § 9(1). "Submitted" includes cases in which "oral argument has been heard or . . . the case has otherwise been submitted to a panel for decision." H.R. REP. NO. 1390, *supra* note 138, at 8. This distinction logically would apply when the record and briefs in a case have been sent to a screening panel. *See generally* Rahdert & Roth, *supra* note 95, at 666-75. The procedure would, of course, include the Administrative Units Plan adopted by the court, which corresponds to the division of two new circuits. 5TH CIR. R. 1. *See* text accompanying notes 134-35 *supra*. It is assumed that the procedure would include all cases decided by and remanded to a panel of the former Fifth Circuit.

153. Reorganization Act, *supra* note 148, § 9(3). This subsection preserves all rights to petitions for rehearing in matters decided or submitted before the effective date. H.R. REP. NO. 1390, *supra* note 138, at 8. It is assumed that this authority would include cases decided by and remanded to the former Fifth Circuit en banc court from the Supreme Court.

154. Reorganization Act, *supra* note 148, §§ 9(1), (3); H.R. REP. NO. 1390, *supra* note 138, at 8.

155. Reorganization Act, *supra* note 148, § 11. The transition period also allows the former Fifth Circuit broad administrative discretion to resolve unforeseen developments. H.R. REP. NO. 1390, *supra* note 138, at 9.

156. Reorganization Act, *supra* note 148, § 9(2). The new circuits thus will begin with an existing docket. H.R. REP. NO. 1390, *supra* note 138, at 8.

157. Reorganization Act, *supra* note 148, § 10(2). This is "the Fifth Circuit *created*" by the Act. H.R. REP. NO. 1390, *supra* note 138, at 9 (emphasis added).

158. Reorganization Act, *supra* note 148, § 10(2).

159. *Id.* § 10(3).

160. Additionally, the Reorganization Act: (1) specifies the number of active judges for each new circuit (14 for the new Fifth Circuit and 12 for the new Eleventh Circuit) (*id.* § 3); (2) specifies one city in each state for holding court in each new circuit (*id.* § 4); (3) assigns the regular active judges to the respective new circuits (*id.* § 5); (4) provides senior judges with an option to be assigned to either new circuit (*id.* § 6); (5) specifies the seniority of the judges within each new circuit (*id.* § 7); and (6) authorizes the new Eleventh Circuit to hold court in the New Orleans courthouse until its own new quarters in Atlanta are complete (*id.* § 8). *See generally* H.R. REP. NO. 1390, *supra* note 138, at 6-9.

161. The three courts will coexist for three years. The effective date of the Reorganization Act is October 1, 1981. The former Fifth Circuit will cease to exist July 1, 1984. Reorganization Act, *supra* note 148, §§ 11-12.

Act's effective date be binding on the limited version of the Fifth Circuit that temporarily survives the split? Secondly, will the precedents of the former Fifth Circuit be binding on the new Fifth Circuit? Finally, will the precedents of the former Fifth Circuit be binding on the new Eleventh Circuit?

Venturing here "a prophec[y] of what the court will do in fact, and nothing more pretentious,"<sup>162</sup> the three courts apparently will answer each question in the affirmative, although like any prophecy, this one is not altogether certain. Former Chief Judge Brown, an opponent of the split before the effects of the Omnibus Judgeship Act of 1978 were felt,<sup>163</sup> considered these "most urgent question[s]."<sup>164</sup> He saw the "uncertainty"<sup>165</sup> of their resolution as raising "significant problems for future efforts to view the Fifth Circuit's opinions on an institutional basis."<sup>166</sup> To some commentators, however, former Fifth Circuit precedent clearly would bind all three new courts.<sup>167</sup> Two members of the former court, who will sit on opposite sides of the great divide, have stated publicly that there will be only affirmative answers to the three questions regarding the use of precedent. Notably, the assurances of Chief Judge Godbold<sup>168</sup> and Judge

162. See note 3 *supra*.

163. See generally notes 120-35 *supra*.

164. Brown, *Revision by Division?*, 6 TEX. TECH. L. REV. 319, 320 (1975).

[T]he division proposal leaves other questions unanswered. The most urgent question to consider is what the precedential value of past and present Fifth Circuit decisions will be in the event the division proposal passes. Is it possible, for instance, for each division to denounce the Fifth Circuit law and begin afresh with "Division" law?

[W]ith enactment of the division scheme, skeptical students, teachers, and authors will have to reckon with (1) the old Fifth Circuit law, (2) the current law of the Western, (3) the current law of the Eastern, and (4) the probable new law of each.

*Id.* The subject of discussion was the ill-fated Senate Bill 11. See text accompanying notes 107-09 *supra*.

165. Brown, *The Great Divide*, 21 LOY. L. REV. 509, 510 (1975): "There remains the uncertainty as to the precedential value of past and present Fifth Circuit decisions as applied to the divided Fifth Circuit . . . [D]igestion and analysis will have to pay considerable attention to the sources of the various decisions: Old Fifth Circuit, Western Division, Eastern Division, or all three." *Id.* Again, the subject of discussion was Senate Bill 11. See text accompanying notes 107-09 *supra*.

166. Brown, *The Fifth Circuit: To Be or Not To Be?*, 20 LOY. L. REV. 415, 417 (1974):

This split could raise significant problems for future efforts to view the Fifth Circuit's opinions on an institutional basis. What happens if the circuit is divided? How is it to be divided? If it is divided, what happens to the presently accepted institutional judicial determinations? Does each circuit start out afresh? To what extent are the decisions [of the former Fifth Circuit] to be binding on the new circuits? Are they to be binding only upon the circuit which happens to be renamed the "Fifth"? Or are they to be binding also on the one chosen to be the "Eleventh"?

*Id.* The subject of this discussion was the split recommended by the Commission on Revision of the Federal Court Appellate System of the United States. See text accompanying notes 88-92 *supra*.

167. See Rahdert & Roth, *supra* note 95, at 661 ("All case law decided before the split will be binding upon each [new] circuit save for *en banc* reversal.").

168. Judge Godbold, who was Chief Judge of the Fifth Circuit prior to the division, will become the first Chief Judge of the new Eleventh Circuit and the first individual in the

Reavley<sup>169</sup> have come since the Reorganization Act was passed. This second group of commentators and judges describes the issues as settled. At least in the minds of the judges, therefore, the questions seem to have been answered.

An informal questionnaire regarding the role of precedent in the courts existing after the split was sent to the thirty-six senior and active judges of the present Fifth Circuit. Twenty-three judges responded, although seven of those responding declined to comment.<sup>170</sup> The overwhelming response to the questionnaire was that the new Fifth Circuit and the new Eleventh Circuit would be bound by former Fifth Circuit precedent.<sup>171</sup> Assuming, *arguendo*, that the issues are settled and that former Fifth Circuit prece-

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nation's history to hold that position in two different circuits (THE THIRD BRANCH, March 1980, at 1, 9), unless, of course, the Eleventh is merely a continuation of the former Fifth. In a speech to the midyear meeting of the Florida Bar, then-Judge Godbold was quoted as saying, "We expect to adopt the Fifth Circuit's body of law which counsel may use as precedents until they are overruled by the court sitting *en banc*." FLORIDA BAR NEWS, Jan. 25, 1981, at 6.

169. Judge Reavley, who will sit with the new Fifth Circuit after the split, has explained, "There is general agreement that both circuits will indicate in their early *en banc* opinions that old Fifth Circuit precedent will continue to govern, and I am confident that the judges on each new circuit will carry out their judicial duties with care and dignity." Reavley, *supra* note 110, at 11.

170. Chief Judge Godbold and Judges Charles Clark, Tjoflat, Thomas A. Clark, Hatchett, Garza, and Randall declined to comment. Thirteen other judges declined to respond. Except for letters declining comment, responses were anonymous.

171. The judges' responses are detailed as follows:

- I. Should the new Fifth Circuit be bound by former Fifth Circuit precedent?

	AFFIRMATIVE	NEGATIVE
A. All responses	14	2
1. New Fifth Circuit judges	8	1
(a) Active judges	6	1
(b) Senior judges	2	0
2. New Eleventh Circuit judges	6	1
(a) Active judges	4	0
(b) Senior judges	2	1

- II. Should the new Eleventh Circuit be bound by former Fifth Circuit precedent?

	AFFIRMATIVE	NEGATIVE
A. All responses	13	2
1. New Fifth Circuit judges	7	1
(a) Active judges*	5	1
(b) Senior judges	2	0
2. New Eleventh Circuit judges	6	1
(a) Active judges	4	0
(b) Senior judges	2	1

- \* One active new Fifth Circuit judge declined to answer for the other court.

dent will be binding in all three courts,<sup>172</sup> the effective implementation of this decision remains unsettled. The next section of this Article will evaluate potential methods of accomplishing this adornment of former Fifth Circuit precedent.

### B.

Three principal mechanisms are available for binding the new courts with the precedents of the former Fifth Circuit: statute, *stare decisis*, and local court rule. While this Article considers each of the three in turn, it should be noted at the outset that the mechanism this analysis prefers is the local court rule.<sup>173</sup> The Reorganization Act does not address the issue whether the precedents of the former Fifth Circuit will bind the limited version of the same court that temporarily survives the split or the new Fifth or Eleventh Circuits. While the legislative history suggests that Congress intended to create two new, independent, and autonomous circuit courts of appeals, each unbridled by the decisional law of the former Fifth Circuit,<sup>174</sup> Congress certainly could have provided a legislative requirement to that effect.<sup>175</sup> Congressional legislation controls much of the day-to-day operation of the courts of appeals. Congress legislates circuit rule

### III. What is the reason for your conclusion regarding the binding nature of former Fifth Circuit precedent?

#### A. Affirmative responses\*\*

<i>Stare decisis</i>	8
Stability and certainty	8
Convenience of attorneys	4
Concern for a particular area of precedent (civil rights)	2
Other: "logic"; "a whole circuit with no precedent?"; "because it will say so."	

#### B. Negative responses

Other: "My guess is that the Court will follow them when it wishes to and ignore them when it does not approve them"; "Did God or the Constitution or any source binding on a new court say it was bound by decisions of a predecessor court?"

\*\* Those responding affirmatively unanimously indicated that precedent in all areas would be binding, and rejected the notion that only certain areas of precedent, such as civil rights, be transplanted.

### IV. If the two new courts should be bound by the procedures of the former Fifth Circuit, how should this be accomplished?\*\*\*

Statute	0
New courts' local rules	5
Early panel decision establishing such a precedent	5
Early <i>en banc</i> decision establishing such a precedent	6
Consensus among the judges on the new courts	5

\*\*\* More than one selection was permissible.

172. *But see* Part III, section C *infra*.

173. If the questionnaire is any indication, only the statutory method lacks support on the court. *See* note 171 *supra*, question IV.

174. *See* text accompanying notes 297-314 *infra*.

175. An express statutory solution would have given the two new courts less freedom



making power,<sup>176</sup> the existence of the judicial council,<sup>177</sup> convening of the judicial conference,<sup>178</sup> the selection and authority of the chief judge,<sup>179</sup> convening of three-judge panels,<sup>180</sup> and the en banc procedure itself.<sup>181</sup> Surely, had Congress seen fit to do so, it could have legislated the effect of former Fifth Circuit precedent in the two new circuits.

The doctrine of separation of powers defines the outermost constitutional limits on this near plenary power "to ordain and establish" these inferior courts.<sup>182</sup> Congress can create and destroy these courts, define and define away their jurisdiction. Congress can redefine a court's jurisdiction to avoid a particular decision,<sup>183</sup> overrule a statutory interpretation,<sup>184</sup> and even begin the process for overruling a Supreme Court interpretation of the Constitution.<sup>185</sup> Legislating the affirmative precedential effect of former Fifth Circuit case law in the three courts would have been akin to these powers. Such a legislative determination of our three issues would have been just one more exercise of the same power that sustained section 34 of the first Judiciary Act, the famous Rules Decision Act,<sup>186</sup> which gives the decisions of state law of the state courts controlling effect in federal courts, at least in some situations.<sup>187</sup> Such a legislative determination of

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than they will have using stare decisis. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 7 (1949).

The history of the federal court system describes a congressional preoccupation with exercising its constitutional power to "ordain and establish" the inferior federal courts, particularly the intermediate level. U.S. CONST. art. III, § 1. The 1980 Act itself establishes a detailed implementation mechanism for determining the locus of adjudication for matters both pending and submitted on the effective date. Reorganization Act, *supra* note 148, § 9. Section 6 of the Omnibus Judgeship Act of 1978 delegated to the numerous judges "super circuits" power to reorganize their en banc function. 28 U.S.C. § 41 (Supp. II 1978). These are merely the two most recent examples of congressional authority over the circuit courts of appeals.

176. 28 U.S.C. §§ 48, 2071 (1976).

177. *Id.* § 322.

178. *Id.* § 333.

179. *Id.* §§ 45, 292-95.

180. *Id.* §§ 43, 46(b).

181. *Id.* § 46(c).

182. While Congress cannot extend the jurisdiction of these courts beyond the Constitution, the disposition of power within the constitutional limit is for Congress alone. Compare *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), with *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). But see *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). See generally Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

183. *E.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); see Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

184. *E.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, *modified*, 339 U.S. 908 (1950), *overruled by* 8 U.S.C. § 1252(b) (1976).

185. U.S. CONST. art. V, § 1, cl. 1. *E.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *overruled by* U.S. CONST. amend. XI (1798).

186. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92; see text accompanying notes 5-15 *supra*.

187. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). The body of case law and literature on this subject are immense. See generally C. WRIGHT, THE LAW OF FEDERAL COURTS §§ 54-60 (3d ed. 1976) and sources cited therein.

our three issues would have been akin to the criminal reception statutes incorporating English common law offenses into the criminal code.<sup>188</sup> Regarding the later analogy, an answer to any appropriate argument that a state sovereign legislature has more power than the legislature of the limited federal government is suggested in the "necessary and proper" clause.<sup>189</sup> In this regard, the split of the Fifth Circuit was based on the House Committee's finding, "the circuit split will better serve the residents, attorneys, and litigants who reside or litigate within the six States involved by creating a more functional and manageable judicial structure."<sup>190</sup> Surely, the same concerns could motivate and justify Congress in establishing former Fifth Circuit case law as precedent in the two new courts.<sup>191</sup>

Congress did not provide an express mandate, however, and it therefore remains to be determined how the new tribunals should implement the use of former Fifth Circuit precedent. A number of possible judicial implementation mechanisms exist. The judges themselves seem to support various alternative mechanisms, including judicial consensus, panel decision, en banc decision, and court rule.

The simplest judicial implementation mechanism is judicial consensus. Whenever an appellate issue would call for the application of federal common law, any panel of the new Fifth Circuit or new Eleventh Circuit simply could apply routinely the appropriate rule of the former Fifth Circuit, subject to an en banc overruling. The most informal method by which to reach this consensus would be for the judges to arrive at an express or tacit understanding among themselves. Such an approach would lack any policing procedure other than peer pressure.<sup>192</sup> A panel might be reluctant to overrule a former Fifth Circuit precedent only out of a concern that its exercise of such a power would acknowledge the power of a second panel to overrule a precedent that the first panel desired to be followed. This sanction is as attenuated as it is convoluted. It provides little check on the independence of a circuit judge, even a judge powerless to act without a concurring vote.<sup>193</sup> This approach also contradicts the notion of the or-

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188. See generally Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910). The trend in the criminal law is toward abolishing such statutes. See, e.g., MODEL PENAL CODE § 1.05 (1962). But see *United States v. Sharpnack*, 355 U.S. 286 (1958) (upheld constitutionality of the Assimilative Crimes Act, 18 U.S.C. § 13 (1976)).

189. U.S. CONST. art. I, § 8, cl. 18. See also *id.* art. III, § 1.

190. H.R. REP. NO. 1390, *supra* note 138, at 9.

191. The judges, however, seem to be opposed to a legislative solution. See note 171 *supra*, question IV.

192. Perhaps litigants could seek compliance under the third-party beneficiary theory of *Lawrence v. Fox*, 20 N.Y. 268 (1859). See *Rinaldi v. United States*, 434 U.S. 22 (1977); *Petite v. United States*, 361 U.S. 529 (1960).

193. Classic examples of reciprocal peer pressure in the Fifth Circuit, which failed to dampen the independence of either judge, are found in the concurring opinion of then Chief Judge Hutcheson and the dissenting opinion of since Chief Judge Brown in *Refinery Employees Union v. Continental Oil Co.*, 268 F.2d 447 (5th Cir. 1959). The summary calendar procedure of the Fifth Circuit expressly requires that panel action be unanimous before dispensing with oral argument. 5TH CIR. R. 18.2. See *Huth v. Southern Pac. Co.*, 417 F.2d 526 (5th Cir. 1969). Even such a formal "agreement" is not always followed. See *United*

derly administration of justice; it is a nonprocedure.<sup>194</sup> Aside from due process concerns for fair notice to litigants and the instilled virtue of the rule of law, misapprehension by the judges themselves could result easily. Indeed, in answering the questionnaire, some responding judges explained that a consensus already had been achieved by the judges on the new courts, while others were of the opinion that former Fifth Circuit precedent could be at most only persuasive authority in the new courts.<sup>195</sup> Finally, except for the most result-oriented, the fact alone that a consensus is reached neither provides a rationale for nor assures the correctness of any decision.<sup>196</sup>

While a consensus, or at least majority, approach to the issue is a necessary first step, it should not be relied upon to the exclusion of more formal mechanisms. The two classic formal judicial mechanisms are the historic *stare decisis et non quieta moviere*<sup>197</sup> and the modern judicial power to promulgate rules. The focus of the inquiry thus shifts to a determination of how best to formalize a judicial consensus when reached.

The most obvious judicial formalizing technique is the court decision, the essence of the common law tradition. The quintessence of the court decision is precedent, or the doctrine of *stare decisis*. The mechanism of *stare decisis* initially must be distinguished from the policies underlying its existence. Under Professor Levi's framework of analysis, the mechanism of *stare decisis* has three stages: (1) a prior decision is identified that is similar to the case to be decided; (2) a rule of law inherent in the prior decision is discerned; (3) the rule of law is applied in the case to be decided.<sup>198</sup> These three tasks devolve on the deciding court through the doctrine of dictum.<sup>199</sup> The facts are the starting point. The deciding court begins the process by determining that the case to be decided has some facts in common with a prior decided case.<sup>200</sup> The deciding court next distills a rule of law from the prior decision. What the prior court wrote

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States v. Williams, 621 F.2d 123 (5th Cir. 1980); Loughney v. Hickey, 635 F.2d 1063, 1065 (3d Cir. 1980) (Aldisert, J., reluctantly concurring under compulsion).

194. The rule of precedent would be illusory if a panel were to consider itself bound only by the latest decision. See Williams v. W. Elec. Co., 618 F.2d 1110, 1111 n.1 (5th Cir. 1980).

195. See note 171 *supra*.

196. See Part III, section C *infra*.

197. "To adhere to precedents, and not to unsettle things which are established." BLACK'S LAW DICTIONARY 1578 (rev. 4th ed. 1968). The term is most often shortened to *stare decisis*.

198. E. LEVI, *supra* note 175, at 2. For other approaches to precedent, see, e.g., B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); J. FRANK, COURTS ON TRIAL (1969); K. LLEWELYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); E. PATTERSON, JURISPRUDENCE (1953). For commentary on the doctrine of *stare decisis* in the unique context of the federal appellate courts, see generally Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979); Mykkeltvedt, *Ratio Decidendi or Obiter Dicta?: The Supreme Court and Modes of Precedent Transformation*, 15 GA. L. REV. 311 (1981).

199. E. LEVI, *supra* note 175, at 3. Some suggest that a dictum itself "represents no definable concept." Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 514 (1952). See also Note, *Judicial Dictum Versus Obiter Dictum*, 16 TEMP. L.Q. 427 (1942).

200. E. LEVI, *supra* note 175, at 3. But see Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 210 (1933) (rules, not facts, constitute precedent).

and intended serve only to guide the deciding court in determining the legal significance of the prior decision.<sup>201</sup> The common law thus can be described as "certain, unchanging, and expressed in rules," while at the same time it is "uncertain, changing, and only a technique for deciding specific cases."<sup>202</sup> Given this theoretical framework, consider the possibility that a three-judge panel in the new Fifth Circuit or new Eleventh Circuit would seek to render the entire case law of the former Fifth Circuit binding.

The avowed purpose of the judges on the two new circuit courts is to render former Fifth Circuit precedent binding on all panels of the new courts, subject to en banc overruling. An example may help bring the problem into focus. Suppose the hypothetical appeal in *Thomas v. Baker* presents to a panel of the new Eleventh Circuit<sup>203</sup> the legal question whether a transfer from a parent corporation to its wholly owned subsidiary may ever, under any circumstances, be considered a separate sale to a favored customer in a Robinson-Patman Act discrimination suit.<sup>204</sup> In the former Fifth Circuit, the answer was an emphatic "no." In *Security Tire & Rubber Co. v. Gates Rubber Co.*<sup>205</sup> the former Fifth Circuit held that a manufacturer's transfer of goods to its wholly owned sales subsidiary could never be considered a separate sale to a favored customer in such a discrimination claim.<sup>206</sup> If the deciding court in *Thomas v. Baker*, the hypothetical Eleventh Circuit panel, were still in the former Fifth Circuit, it would be bound to answer the same question the same way.<sup>207</sup> Now suppose the hypothetical Eleventh Circuit deciding panel: (1) identifies the factual similarities in the two cases; (2) discerns that the rule of law in the former Fifth Circuit decision controls; and (3) applies the rule to conclude that a Robinson-Patman Act claim is not established in *Thomas v. Baker*. Suppose further that the hypothetical Eleventh Circuit deciding panel "holds" that it must follow all former Fifth Circuit precedent en route to deciding *Thomas v. Baker*. A second hypothetical Eleventh Circuit appeal that raises the very same issue obviously must be decided the same way. Yet this second appeal could be decided not on the former Fifth Circuit

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201. E. LEVI, *supra* note 175, at 2-3.

202. *Id.* at 4.

203. The example also would apply to a panel of the new Fifth Circuit. See notes 285-88 *infra*. The need for an actual appeal seems irrefutable. Throughout this section the assumption is made that the new Fifth and Eleventh Circuit Courts of Appeals would abide by the Article III "case or controversy" requirement and would not attempt to issue either a panel or an en banc advisory opinion. See generally H. BLACK, *LAW OF JUDICIAL PRECEDENTS* 88-90 (1912); HART & WECHSLER, *supra* note 4, at 64-70; Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. 1 (1959); Wagner, *Advisory Opinions in the Federal Judiciary—A Comparative Study*, 27 U. KAN. CITY L. REV. 86 (1958). Perhaps a litigant in a pending case whose appeal would be affected by the decision to follow or overrule former Fifth Circuit precedent could bring an action for a declaratory judgment on the issue. See 28 U.S.C. §§ 2201-02 (1976).

204. 15 U.S.C. § 13 (1976).

205. 598 F.2d 962 (5th Cir. 1979).

206. *But cf. id.* at 967 n.3 (suggesting same result would be reached under rejected theory).

207. See text accompanying notes 270-77 *infra*.

precedent of *Security Tire & Rubber Co.*, but on the decision of the first hypothetical Eleventh Circuit panel in *Thomas v. Baker* itself. A panel of the Eleventh Circuit could not overrule a prior panel decision of that same court.<sup>208</sup> *Thomas v. Baker* would be the controlling precedent; *Security Tire & Rubber Co.* would be considered persuasive authority of another court that was followed. The second hypothetical Eleventh Circuit panel would have to "follow the leader," but its leader is the panel in *Thomas v. Baker* rather than the panel in *Security Tire & Rubber Co.*

The first hypothetical Eleventh Circuit panel also "held" that all precedents of the former Fifth Circuit are binding on the new Eleventh Circuit. In later Eleventh Circuit appeals raising unrelated substantive questions, the only similar "fact" in *Thomas v. Baker* from which a rule of law could be discerned is the precedential status of former Fifth Circuit decisions. These later Eleventh Circuit cases would have in common with *Thomas v. Baker* only the circumstance that the former Fifth Circuit had answered the substantive question they raise, just as it had answered the question raised in *Thomas v. Baker*. This extraneous "fact" cannot be enough to sustain the categorical application of former Fifth Circuit precedent in every case. The contention cannot seriously be made that *Thomas v. Baker* somehow becomes a conduit of former Fifth Circuit precedent and is itself *stare decisis* for later Eleventh Circuit cases involving divergent facts and raising divergent issues. *Thomas v. Baker* surely would control a second Robinson-Patman Act case involving the same issue of defining a favored sale, but the statement that all former Fifth Circuit precedent is binding on Eleventh Circuit panels is merely a dictum.<sup>209</sup> The precedential impact of *Thomas v. Baker* cannot be said to incorporate former Fifth Circuit case law covering antitrust doctrine under the Sherman Act and Clayton Act,<sup>210</sup> nor would it be precedent for Eleventh Circuit cases involving such unrelated issues as defining a public figure for first amendment purposes,<sup>211</sup> determining whether a criminal prosecution was unconstitutionally selective,<sup>212</sup> considering whether ancillary jurisdiction exists in a diversity suit,<sup>213</sup> deciding whether the joint representation of a husband and wife tried together is a *per se* violation of the sixth amend-

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208. *See id.*

209. This would be so even under the most narrow definition of a dictum, which in turn would give the broadest possible effect to *stare decisis*. "A dictum is a statement of law in the opinion which could not logically, on the facts found, be a major premise for the selected facts and the decision." E. PATTERSON, *supra* note 198, at 313. *See also* Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928). For a comparison of American and English notions of precedent, see D. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* 154-56 (1963).

210. *See, e.g.*, *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979); *Hayes v. Solomon*, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

211. *See, e.g.*, *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978).

212. *See, e.g.*, *United States v. Johnson*, 577 F.2d 1304 (5th Cir. 1978).

213. *See, e.g.*, *Amco Constr. Co. v. Mississippi State Bldg. Comm'n*, 602 F.2d 730 (5th Cir. 1979).

ment,<sup>214</sup> or divining state law in diversity cases.<sup>215</sup> Such a result would be magical, but it would not be *stare decisis*.<sup>216</sup>

Considering a slightly different hypothetical, suppose the dictum in *Thomas v. Baker*, that all former Fifth Circuit precedents were to be binding in the new Eleventh Circuit, expressed only a reluctant adherence to that rule of law. The hypothetical panel might describe the law in the former Fifth Circuit and suggest that, while as a matter of first impression it would decide the issue differently, it is unable to overrule *Security Tire & Rubber Co.*<sup>217</sup> The same analysis still would apply; certainly no one would argue that *Thomas v. Baker* was any less of a precedent on the narrow Robinson-Patman Act issue, and only the en banc court could reverse the decision.<sup>218</sup> To suggest, then, that the decision would become any *more* of a precedent, that its holding was somehow transfigured and now casts its shadow over the issues listed above and all others ever to be considered by an Eleventh Circuit panel, defies logic.<sup>219</sup> Once the panel decision mechanism is recognized as ineffective within this loose framework of *stare decisis*, the corollary is that more stringent theories of *stare decisis*, which would give our hypothetical *Thomas v. Baker* even narrower precedential value, would be to no avail.<sup>220</sup>

A single panel decision of the new Eleventh Circuit cannot conceivably bind the entire court to follow all of the former Fifth Circuit's precedent. The mechanism of *stare decisis* cannot extend so far. Such a determination is beyond the level of application and is asymptotic to the doctrine. At this level, *stare decisis* becomes "a principle of policy and not a mechanical policy of adherence."<sup>221</sup> The pertinent question thus becomes whether a three-judge panel is the appropriate forum to make the determination and announce the adoption of the entire corpus juris of the former Fifth Circuit. Clearly the announcement by an Eleventh Circuit panel that it is bound, or not bound, by Eleventh Circuit precedents means little if anything.<sup>222</sup> The policy of *stare decisis* does not depend for its viability on

214. See, e.g., *United States v. Johnson*, 569 F.2d 269 (5th Cir. 1978).

215. See, e.g., *Moczygemba v. Danos & Curole Marine Contractors, Inc.*, 561 F.2d 1149 (5th Cir. 1977).

216. Mykkeltvedt, *supra* note 198, at 312. The same analysis applies to a case arising in the new Fifth Circuit. If the hypothetical *Thomas v. Baker* had been decided in the new Fifth Circuit, it could not serve as precedent on such extraneous issues. See notes 210-14 *supra*.

217. In *Keel v. United States*, 572 F.2d 1135 (5th Cir. 1978), the panel described the Fifth Circuit precedents and lamented, "[s]uch is the law of the Fifth Circuit." *Id.* at 1137. On rehearing, the author of the panel opinion wrote an en banc opinion, in which the remaining members of the panel joined, reversing and rejecting the principle of law that the panel had felt bound to apply. 585 F.2d 110 (5th Cir. 1978) (en banc).

218. See text accompanying notes 270-77 *infra*.

219. See notes 210-14 *supra*.

220. See, e.g., Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied*, 21 WASH. L. REV. 158 (1946); Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); Radin, *supra* note 200; Wise, *The Doctrine of Stare Decisis*, 21 WAYNE ST. L. REV. 1043 (1975). See note 198 *supra*.

221. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

222. See notes 227-30 *infra*.

an isolated application. The same can be said of the problem under consideration; the announcement by an Eleventh Circuit panel that all panels of the new court are to be bound by the precedents of the former Fifth Circuit will not make it so.

Initially an en banc court in the new Eleventh Circuit might seem to be the appropriate forum to make such a determination and announce that Eleventh Circuit panels were bound to follow former Fifth Circuit case law.<sup>223</sup> The court could grant rehearing en banc in *Thomas v. Baker*.<sup>224</sup> As far as the mechanism of precedent is concerned, the en banc court would be subject to much the same restraints discussed regarding the hypothetical panel, which need not be repeated here.<sup>225</sup> Because all active judges would sit on the Eleventh Circuit en banc court, the judicial pronouncement of that court would be more representative than the decision of a three-judge panel. Further, if the en banc decision were unanimous, some vague notion of estoppel would arise should any of those judges depart from the announced rule while later sitting on panels. While the validity of the estoppel argument would be diluted over time, as new judges were appointed to the court, by then a significant body of Eleventh Circuit precedent would have developed. The en banc pledge also could be renewed from time to time.

Consideration of another factor, however, suggests that the en banc court pronouncement incorporating former Fifth Circuit precedent would have even less precedential value than a panel pronouncement. Such an opinion would be no more than an instruction to the panels that they are to be bound, while the en banc court itself claims the power to overrule former Fifth Circuit precedent. In terms of its application, the en banc pronouncement would be merely an announcement of a consensus<sup>226</sup> akin to the policy of stare decisis. While the Eleventh Circuit en banc consensus that panels are to be bound by former Fifth Circuit precedent is of the same order of magnitude as stare decisis, the two concepts are not the same.<sup>227</sup> The policy of stare decisis is not a creation of a particular case precedent; it has a separate and unique vitality. The rule of precedents does not depend on, but inheres in, decisional law. The new Eleventh Circuit en banc court, and a fortiori a panel, could not announce that decisions of the Eleventh Circuit, en banc and panel, would never be binding in the Eleventh Circuit. This would produce a paradox similar to that of the Cretan liar who said, "I always tell lies."<sup>228</sup> If the Eleventh Circuit is to be bound by decisions of the former Fifth Circuit, that conclusion should be reached independently, and the underlying premises for the con-

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223. Judge Reavley has explained: "There is general agreement that both circuits will indicate in their early en banc opinions that old Fifth Circuit precedent will continue to govern . . . ." Reavley, *supra* note 110, at 11.

224. See text accompanying notes 203-19 *supra*.

225. See text accompanying notes 198-219 *supra*.

226. See text accompanying notes 192-97 *supra*.

227. See text accompanying notes 198-219 *supra*.

228. The allegory is from Stone—de Montpensier, *The Compleat Wrangler*, 50 MINN. L. REV. 1001, 1015 (1966).

clusion should be articulated; the court should do more than merely announce a consensus. First, the court should choose rationally between any alternatives that are presented.<sup>229</sup> Secondly, the court should articulate and announce the rationale for its choice. While the en banc court might choose simply to say that stare decisis means that the former Fifth Circuit precedents bind, saying it is so does not make it so. The court's mastery over stare decisis does not extend so far.<sup>230</sup>

The rulemaking power of the court provides an administrative alternative to the judicial mechanisms of panel or en banc decisions.<sup>231</sup> This alternative, however, presents its own problems. The new Court of Appeals for the Eleventh and Fifth Circuits will have congressionally delegated authority to "prescribe rules for the conduct of their business."<sup>232</sup> Theoretically,

229. This is, after all, the minimum judicial expectation imposed by the Constitution on the other co-equal branches. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

230. "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I mean 'there's a nice knock-down argument for you!'" "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected. "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

L. CARROLL, *THROUGH THE LOOKING GLASS*, quoted in *United States v. Kindrick*, 576 F.2d 675, 677 n.2 (5th Cir. 1978), and *United States v. Hand*, 576 F.2d 472, 477 n.1 (5th Cir. 1975) (en banc dissent).

231. The judicial council is a second administrative aspect of the courts of appeals. Comprised of the chief judge and all the regular active circuit judges, the council is designed and functions as an administrative body and not as the court en banc. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 83 n.5, 86 n.7 (1970). As such, the judicial council is empowered to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332(d) (Supp. III 1979). Because members of the council serve as individuals and not as circuit judges, the council may operate as an executive or as a legislature, and is not bound by the Article III limits on courts imposed by the separation of powers doctrine. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590-91 (1949); *In re Rodebaugh*, 10 F.R.D. 207 (3d Cir. 1970) (Judicial Council). Acting in a legislative mode, the judicial councils of the two new circuits could issue an order directing that former Fifth Circuit precedent control panels. A reporting problem would have to be overcome; actions of the judicial councils usually are not disseminated widely. Moreover, while a legislative approach may be preferred, see notes 174-91 *supra*, a provision in the local rules of the new circuits would be more desirable. See text accompanying notes 237-49 *infra*. The historical function of the judicial councils has been directed toward the efficiency of the district courts. See, e.g., *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970); *In re Charge of Judicial Misconduct*, 613 F.2d 768 (9th Cir. 1980); *In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973); *Hilbert v. Dooling*, 476 F.2d 355 (2d Cir.), *cert. denied*, 414 U.S. 878 (1973). See generally Comment, *The Authority of the Circuit Judicial Councils: Separation of Powers in the Courts of Appeals*, 5 SETON HALL L. REV. 815 (1974).

232. 28 U.S.C. § 2071 (1976) provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." This authority is continued in FED. R. APP. P. 47 which provides:

Each court of appeals by action of a majority of the the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsis-



cally, each could adopt a local rule providing that the precedents of the former Fifth Circuit are to bind panels in the new courts. Such an approach raises several concerns. If such a rule was inconsistent with the Act of Congress creating the new courts, it would be invalid.<sup>233</sup> Also, present Fifth Circuit rules do not cover the rule of precedent in Fifth Circuit decisions.<sup>234</sup>

While the matter of precedent may appear more appropriately handled through judicial action than by rulemaking, the conceptual difficulties inherent in such an approach already have been discussed.<sup>235</sup> A rule would be efficient,<sup>236</sup> and if legitimate, it instantly would incorporate former Fifth Circuit case law across the board. Such a wholesale adoption of Fifth Circuit precedent, however, might generate unnecessary en banc rehearings, because only that mechanism would be available for reconsideration of former Fifth Circuit precedents.

Rulemaking by the courts of appeals resembles a legislative process. In its adjudicative role, the court is limited by such restraints as the "case or controversy" requirement and the doctrine of stare decisis. The court's rulemaking process is not subject to these limits, but neither is it subject to comparable safeguards on the legislative process.<sup>237</sup> Court rules are often the product of secluded decisionmaking without an opportunity for public involvement. This shortcoming can be remedied easily by public dissemination of the proposed rule to the bar in the new circuits, with an opportunity to respond.<sup>238</sup>

The rulemaking solution also would be subject to debate on the merits of such an approach.<sup>239</sup> In the presumed absence of congressional deci-

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tent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

For an account of the historical origins of the rulemaking power, see Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 916-17 (1976). Such rules have the force and effect of law. See, e.g., *Bradley v. Pace*, 183 F.2d 806 (D.C. Cir. 1950).

233. See 28 U.S.C. § 2011 (1976). See also *Jimenez v. Aristiguieta*, 314 F.2d 649 (5th Cir.), cert. denied, 373 U.S. 914 (1963). See also text accompanying notes 306-25 *infra*. The question also arises whether such a proposal would be inconsistent with or supplemental to FED. R. APP. P. 35, which deals with general en banc procedures. An inconsistent local rule would be void. See note 232 *supra*. An inherent power to declare rules is unlikely. See Weinstein, *supra* note 232, at 907. See also J. CRATSLEY, *INHERENT POWERS OF THE COURTS* (1980). Any constitutional argument that Congress cannot delegate rulemaking power has been overruled by history. See *id.* at 927-31; *Palermo v. United States*, 360 U.S. 343 (1959). Some minimal constitutional restrictions on rulemaking power exist, however, such as overbreadth. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975); *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir. 1975). The courts of appeals may impose narrower restrictions than those constitutionally required. See *United States v. Cheramie*, 520 F.2d 325, 330 n.6 (5th Cir. 1975).

234. See text accompanying notes 270-77 *infra*.

235. See text accompanying notes 192-230 *supra*.

236. See Weinstein, *supra* note 232, at 910.

237. See generally *id.*

238. The Ninth Circuit's approach to § 6 of the Omnibus Judgeship Bill could be followed. See note 118 *supra*. For a suggested procedure for use in the new courts for adopting local rules, see Weinstein, *supra* note 232, at 963-64.

239. See Part III, section C *infra*.

sion,<sup>240</sup> judicial action is fraught with interminable problems.<sup>241</sup> The administrative rulemaking procedure is an alternative. A proposed rule is offered here for adoption by the new courts of appeals as part of their en banc procedure:<sup>242</sup>

#### EN BANC REVIEW BEFORE PANEL DECISION

- (A) A proposed opinion, approved by a panel of this court reaching a result that would overrule a decision of the former fifth circuit shall not be issued unless it is first circulated among the active members of this court and a majority of them do not vote to consider the case en banc.
- (B) When the panel opinion is issued after compliance with (A), the published opinion shall contain a footnote referring to this rule and worded, depending on the circumstances, as follows:

This opinion has been circulated among all judges of this court in regular, active service. [No judge favored, *or* A majority did not favor] an en banc consideration on the question of [*e.g.*, overruling *Thomas v. Baker*].

Recalling that Learned Hand once described federal judges as “curiously timid about innovations,”<sup>243</sup> this offered rule is an overt compromise. It would not make the former Fifth Circuit case law completely binding on panels in the new courts. Instead, a panel would have authority to accept or reject the former Fifth Circuit precedent. Recognizing the parent circuit and a legitimate concern for continuity, however, the panel’s authority would be limited by the requirement that the opinion be circulated to the en banc court. Opinion circulation is the most effective intramural procedure for determining “enbancworthiness” before the panel decision.<sup>244</sup> Limiting opinion circulation to opinions that “would overrule a decision of the former fifth circuit,” presumably reduces the amount of time required for monitoring the procedure.<sup>245</sup> While institutionalized second-guessing might increase the proportion of requests for rehearings,<sup>246</sup> the need for en banc courts might well be decreased due to the initial involvement of a “multitude of counselors.”<sup>247</sup> The number of en banc rehearings would depend on the new court’s perception of the need to part ways with the former Fifth Circuit. The proposed rule would foster an independence in the new courts that a completely binding rule would

240. *But see* text accompanying notes 297-314 *infra*.

241. *See* text accompanying notes 199-230 *supra*.

242. *See, e.g.*, 5TH CIR. R. 16; 7TH CIR. R. 16(e). A written rule, while perhaps technically not required, would be necessary to achieve the desired effect. *See, e.g.*, *Payne v. Garth*, 285 F. 301 (8th Cir. 1922).

243. Hand, *The Contribution of An Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 155, 158 (Dilliard ed., 3d ed. 1960).

244. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 271-72 (1953) (Frankfurter, J., concurring); K. LLEWELYN, *supra* note 198, at 315-16.

245. Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U.L. REV. 726, 728 (1965).

246. Roscoe Pound termed this effect the “rehearing evil.” R. POUND, *supra* note 5, at 373.

247. *See generally* Jones, *Multitude of Counselors: Appellate Adjudication As Group Decision-Making*, 54 TUL. L. REV. 541 (1980).

stifle. In addition to implementing the proposed rule, the new circuits could streamline the en banc procedure itself by having the issue of overruling the former Fifth Circuit submitted on briefs. In this special category, polling on the merits possibly could be accomplished by mail. This compromise<sup>248</sup> avoids the difficulties of a completely binding rule treating former Fifth Circuit precedent as if it were decided by the new court, as well as the assumed problem of regarding former Fifth Circuit precedent as if it were as unrelated to the new courts as a decision from any of the other circuits.<sup>249</sup>

Finally, this discussion must turn to the appropriateness of this second assumption. The progressively narrowed focus now must be broadened to consider whether former Fifth Circuit precedent should have a special status in the new courts.

### C.

In the course of this Article, the assumption has been that the precedents of the former Fifth Circuit will bind the limited Fifth Circuit that survives the Reorganization Act, the new Fifth Circuit, and the new Eleventh Circuit.<sup>250</sup> Before examining the merits of this assumption, the tensions among panels and between panels and the en banc court must be appreciated. In a sense, the development of separate panel and en banc functions is a continuation of two leitmotifs in the history of the federal court system. This development largely has been the product of a congressional preoccupation with the centrality and importance of the intermediate tier,<sup>251</sup> coupled with constant institutional pressures from the surrounding two layers.<sup>252</sup>

No intermediate appellate court in the federal system existed before the 1891 Evarts Act created the circuit courts of appeals.<sup>253</sup> These courts were not to make law, however; that role was reserved for the Supreme Court. The new courts' function was rather "to correct individual injustice and

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248. This proposal is based in large measure on the approach taken by the Seventh Circuit regarding panel overrulings of Seventh Circuit precedent. 7TH CIR. R. 16(e) provides:

(e) Rehearings Sua Sponte Before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule of procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe*.)

249. See notes 275, 277 *infra*.

250. See text accompanying notes 161-72 *supra*.

251. See text accompanying notes 19-21 *supra*.

252. See text accompanying notes 49-54 *supra*.

253. Act of March 3, 1891, ch. 517, §§ 2-3, 26 Stat. 826, 826-27.

control erroneous or lawless behavior by judges or other officials.”<sup>254</sup> Two basic features of the new circuit courts of appeals were taken from the pre-existing circuit courts. First, the jurisdictional boundaries of the new courts were drawn along the geographical lines of the nine existing circuits.<sup>255</sup> Secondly, Congress incorporated the circuit court panel procedure, declaring that the circuit courts of appeals “shall consist of three judges.”<sup>256</sup> While the Judicial Code of 1911 abolished the circuit courts, it maintained the provision for three-judge courts of appeals.<sup>257</sup> The 1911 Code also provided for more than three judgeships in some circuits, and whether a “court” was to be composed of three or all of the judges assigned to a circuit soon became unclear.<sup>258</sup>

As caseloads increased, additional judgeships were added.<sup>259</sup> By 1938 all but two of the circuits had more than three circuit judges, although only the District of Columbia Circuit Court of Appeals regularly sat en banc.<sup>260</sup> As increased numbers of judges made possible more multiples of three-judge panels, the courts of appeals needed procedures in order to preserve two institutional values: uniformity among panel decisions and control of the law of the circuit by a majority of its judges.<sup>261</sup> The en banc court, with all active members of the court sitting together, would become a vehicle to preserve these two values.

The catalyst for formalizing the en banc function in the courts of appeals was a conflict between the Ninth Circuit and the Third Circuit. A Ninth Circuit panel had held that Congress had authorized only a three-judge court.<sup>262</sup> Soon afterwards the Third Circuit began to sit en banc in certain cases.<sup>263</sup> The Supreme Court granted certiorari to resolve the con-

254. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 200 (1976).

255. The federal system had been divided into nine circuits in 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. See text accompanying notes 43-47 *supra*.

256. Act of March 3, 1891, ch. 517, §§ 2-3, 26 Stat. 826, 826-27.

257. Act of March 3, 1911, ch. 231, §§ 117-18, 36 Stat. 1131, 1131.

258. *Id.* A 1912 amendment made explicit which circuit court judges were to sit on an assigned court of appeals, but further blurred the definition of “court.” Act of January 13, 1912, ch. 9, § 118, 37 Stat. 52, 53.

259. Typically, the judges were added to the “circuit,” not to the “court,” evincing a congressional intention to enlarge the tribunal rather than the panel. See Note, *The Power of a Circuit Court of Appeals to Sit En Banc*, 55 HARV. L. REV. 663, 665-66 (1942). The growth of the intermediate tier has been dramatic. The 1891 structure provided for nine circuits, each having three judges. Today eleven circuits and 132 appellate judgeships exist. The former Fifth Circuit had one fewer judge than the total number originally provided for the entire country. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 3(b), 92 Stat. 1629, 1632 (amending 28 U.S.C. § 44(a) (1976)).

260. Act of August 3, 1949, ch. 387, § 1, 63 Stat. 493, 493. This was due, in part, to the District of Columbia court’s unique status as the equivalent of a state supreme court for the District. See generally Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Parts I & II)*, 40 N.Y.U.L. REV. 563 & 726, 571 n.60 (1965).

261. See Note, *United States v. Mandel: The Problem of Evenly Divided Votes in En Banc Hearings in the United States Courts of Appeals*, 66 MD. L. REV. 919, 920 (1980).

262. *Lang’s Estate v. Commissioner*, 97 F.2d 867, 869 (9th Cir.), *certified*, 304 U.S. 264 (1938).

263. See *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 67-71 (3d Cir. 1940) (en banc), *aff’d*, 314 U.S. 326 (1941).

flict, and held in *Textile Mills Security Corp. v. Commissioner* that a court of appeals possessed an inherent right to sit en banc.<sup>264</sup> Congress codified this holding in the Judicial Code of 1948, which required a majority vote of the active judges in a circuit to convene an en banc court, thereby insuring that the more efficient panels would continue to be the primary mode of operation.<sup>265</sup> In 1953 the Supreme Court reconsidered and elaborated upon both its holding in *Textile Mills* and Congress's 1948 codification of that opinion. Two questions remained unanswered: Which cases were appropriate for en banc hearing and what internal procedures were necessary to accomplish an en banc hearing. In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*<sup>266</sup> the Court held that the filing of a petition for a rehearing en banc did not compel the full court either to sit or conduct a poll on whether to sit en banc. According to the Court, the petition was only the litigant's suggestion of the appropriateness of convening the full court; a judge could request a poll sua sponte. The Court also was careful to distinguish between the panel's decision to rehear and the full court's decision to rehear. While the Court did not describe any detailed procedures, it stated that any procedures adopted were to be made public.<sup>267</sup> Following this decision, a confused and often mysterious patchwork of en banc procedures was developed by the individual circuits.<sup>268</sup> Finally the Supreme Court codified the institutional value justifications for en banc courts in the 1968 Federal Rules of Appellate Procedure. Federal Rule of Appellate Procedure 35(a) provides:

A majority of the circuit judges who are in regular active service may order that an appeal or other proceedings be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

Beyond the basic provisions of this rule, each circuit may prescribe intramural procedures, and a majority has done so.<sup>269</sup> By 1968 the courts of

264. 314 U.S. 326, 331-35 (1941). See also Comment, *The En Banc Procedures of the United States Courts of Appeals*, 21 U. CHI. L. REV. 447 (1954).

265. See Comment, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 403 (1974). The current version provides:

Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service.

28 U.S.C. § 46(c) (1976), as amended by Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 5(a), 92 Stat. 1629, 1633. For a detailed review of the legislative history of the 1948 codification, see *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250-60 (1953).

266. 345 U.S. 247 (1953). See generally Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91 (1954).

267. 345 U.S. at 260-62.

268. See Note, *En Banc Procedures in the Federal Courts of Appeals*, 111 U. PA. L. REV. 220, 221-28 (1962).

269. See D.C. CIR. R. 14; 1ST CIR. R. 16; 3D CIR. R. 2(3); 5TH CIR. R. 16; 6TH CIR. R. 14;

appeals had grown not only in size but in importance. More intermediate appeals meant more judges.<sup>270</sup> When caseload pressures in the Supreme Court necessitated the use of more discretionary control over that Court's docket, the courts of appeals began to share in the role of developing the law.<sup>271</sup> The increase in circuit-level judgeships increased the risk of intracircuit conflict, threatening the institutional values of uniformity and majority judge control. The en banc court was the logical device for maintaining the uniformity of a majority of the court, so that there would be but one court, sitting in divisions.<sup>272</sup> Until the advent of the "super courts" having more than fifteen judges, the en banc mechanism was effective.<sup>273</sup>

Because convening an en banc court involves substantial delay and expense, however, the scarcity of judicial resources dictates that its use be minimized. One method of controlling the need for convening the en banc court is for the panels to treat earlier decisions of any panel as binding precedent, absent intervening en banc or Supreme Court action.<sup>274</sup> This

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7TH CIR. R. 16; 8TH CIR. R. 7; 9TH CIR. R. 12. For graphic portrayals of the individual circuit's en banc experiences, see Note, *supra* note 261, at 941; Note, *supra* note 260, at 603-08. For a discussion of the states' experiences with divisional panels, en banc courts, and intermediate appellate courts generally, see M. OSTHUS, *INTERMEDIATE APPELLATE COURTS* (1976); Hopkins, *The Role of An Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

270. See note 259 *supra*. For the Fifth Circuit's experience with adding judges, see text accompanying notes 93-120 *supra*. See generally Evans, *Fifty Years of United States Circuit Court of Appeals*, 9 MO. L. REV. 189 (1944).

271. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 334-35 (1941); P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 254, at 200-01; Hopkins, *supra* note 269. Judge Lay suggests that the transformation should be completed. Lay, *supra* note 77, at 1158.

272. The decision of a panel is considered a decision of the court. See *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953).

273. As the size of the full court grew out of all proportion to the three-judge panel, the device became more and more unwieldy:

Twenty judges cannot conduct a meaningful hearing, nor can they effectively deliberate. As the number of judges within a circuit is increased, *en banc* procedures become not only less effective, but more costly and more dilatory and therefore less likely to be invoked. Thus, it becomes less useful as an implicit restraint on the individual panels. Indeed, as the size of the court increased, the likelihood of differences among the judges is increased.

Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 584 (1969). See also P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 254, at 201-02. Between 1977 and 1978 the en banc rehearings in the Fifth Circuit nearly tripled, which compounded the problem. See Note, *supra* note 261, at 941. With such large en banc courts, the problems grew even worse; delay and division became pronounced. See, e.g., *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (on rehearing en banc for two years); *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) (en banc court divided in five opinions). See also text accompanying notes 119-31 *supra*.

En banc rehearings appear to be a necessary evil. The advantages of their elimination—reducing costs and delay for the courts and litigants and increasing the finality of panel decisions—are outweighed by the concomitant disadvantages of abolition—the loss of restraint on panels and intracircuit conflicts. See Note, *supra* note 261, at 934 n.65. Cf. R. POUND, *supra* note 5, at 373-74. For a glimpse of the awesomeness of the undivided Fifth Circuit docket, see Rubin, *Introduction to Fifth Circuit Symposium*, 25 LOY. L. REV. 441 (1979). See also note 140 *supra*.

274. ABA STANDARDS RE APPELLATE COURTS § 3.01, Commentary, at 12 (Tent. Draft 1976). This rule should be distinguished from the related "law of the case" doctrine, which

rule of interpanel accord is well-ingrained in the precedents of the Fifth Circuit Court of Appeals<sup>275</sup> and each of its sibling circuits.<sup>276</sup> Within this context of panel/panel and panel/en banc court relations, the three questions previously raised about the use of former Fifth Circuit precedent in the three new courts must be considered.<sup>277</sup>

An examination of the effect of the precedents of the former Fifth Circuit decided before the effective date of the Reorganization Act on the limited version of the Fifth Circuit temporarily surviving the split involves an analysis of the obvious. The Reorganization Act insures that the former Fifth Circuit will continue to decide cases submitted before the effective date of the Act.<sup>278</sup> In the decision of these matters, the former Fifth Circuit will be constrained to follow the rule of interpanel accord requiring a panel to treat as binding all earlier decisions of another panel, absent intervening en banc or Supreme Court review.<sup>279</sup> The en banc court of the

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involves two panels deciding different phases of the same case. *See, e.g.*, *EEOC v. Int'l Longshoreman's Ass'n*, 623 F.2d 1054 (5th Cir. 1980); *Potaashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980); *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978) (en banc), *aff'd*, 444 U.S. 472 (1979).

275. Discussing the challenge of sitting on a court composed of 26 active and 10 senior judges, Judge Hill emphasized the importance of the rule:

Whether or not such a body can fairly and efficiently articulate, in one voice, the law affecting nearly 50 million people remains to be seen. I submit that our success may in large part depend on our adherence to the doctrine of *stare decisis*. If we give only lip service to the rule that one panel is bound by prior panel decisions, we run the risk of transforming what has heretofore been an orderly institution into an inconsistent, unpredictable body, made up of three-judge panels that resemble waterbugs chasing each other around and around the surface of a summer pond.

*Gates v. Collier*, 616 F.2d 1268, 1283 (5th Cir. 1980) (Hill, J., dissenting in part).

Because of institutional pressures, the rule of interpanel accord seems to play a more significant role in the law of the larger circuits, such as the Fifth. *See, e.g.*, *Dahl v. Akin*, 630 F.2d 277 (5th Cir. 1980); *Cargill, Inc. v. Offshore Logistics, Inc.*, 615 F.2d 212 (5th Cir. 1980); *Williams v. Blazer Financial Servs., Inc.*, 598 F.2d 1371 (5th Cir. 1979); *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978); *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976); *Davis v. Estelle*, 529 F.2d 437 (5th Cir. 1976); *Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976); *United States v. Automobile Club Ins. Co.*, 522 F.2d 1 (5th Cir. 1975); *Burroughs v. United States*, 515 F.2d 824 (5th Cir. 1975); *Popeko v. United States*, 513 F.2d 771 (5th Cir. 1975); *Linebery v. United States*, 512 F.2d 510 (5th Cir. 1975); *United States v. Lewis*, 475 F.2d 571 (5th Cir. 1972); *Schwegmann Bros. Giant Super Mkts. v. Hoffman-La Roche, Inc.*, 221 F.2d 326 (5th Cir.), *cert. denied*, 350 U.S. 839 (1955).

276. *See, e.g.*, *Sikora v. American Can Co.*, 622 F.2d 1116 (3d Cir. 1980); *United States v. Martorano*, 620 F.2d 912 (1st Cir. 1980); *Caldwell v. Ogden Sea Transp.*, 618 F.2d 1037 (4th Cir. 1980); *Henderson v. Milobsky*, 595 F.2d 654 (D.C. Cir. 1978); *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083 (3d Cir. 1975); *United States v. Jenson*, 450 F.2d 1258 (9th Cir. 1971); *Maryland Cas. Co. v. American Fidelity & Cas. Co.*, 330 F.2d 526 (6th Cir. 1964); *United States v. United States Vanadium Co.*, 230 F.2d 646 (10th Cir. 1956); *E. Edelman & Co. v. Triple-A Speciality Co.*, 88 F.2d 852 (7th Cir. 1937); *Omaha v. Omaha Elec. Light & Power Co.*, 255 F. 801 (8th Cir. 1919). *See also* Annot., 37 A.L.R. FED. 274 (1978). Panels occasionally depart from this rule. *See, e.g.*, *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *cf.* *Speigner v. Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980). Such departures may raise complicated problems of procedure. *See* *Davis v. United States*, 417 U.S. 333 (1974). *See generally* Note, *supra* note 260.

277. *See* text accompanying note 161 *supra*.

278. Reorganization Act, *supra* note 147, § 9; *see* text accompanying notes 151-55 *supra*.

279. *See* note 275 *supra*.

former Fifth Circuit will not be so bound, as was also true before the Reorganization Act. This rule of interpanel accord, based on the need for uniformity within a circuit, maintains the rule of one law of the circuit. Although the judges sit in panels of three, they are judges for the whole court, and the court's position on the law represents the view of all, or at least a majority, of the judges who comprise the court. The judges are equals, as are the three-judge panels.<sup>280</sup> Permitting the primacy of one panel over another would demean the integrity of the overruled panel and its members and would destroy the notion of uniformity within a circuit.<sup>281</sup>

The continuation of the former Fifth Circuit is of significance with respect to the viability of former Fifth Circuit precedent in the two new courts of appeals. Decisions of former Fifth Circuit panels on matters submitted before the effective date and decisions of the en banc court in matters decided by a panel before the effective date are to be processed as if the Reorganization Act had not been enacted.<sup>282</sup> If the two new courts of appeals conclude that former Fifth Circuit precedent is to bind their panels, a group of cases not decided until after the effective date would be included. A former Fifth Circuit panel could thus decide an issue of first impression after the issue had been decided by a panel of one of the new courts. Requiring the panel in the former Fifth Circuit to abide by the decision of the new court's panel would be inconsistent with the rule of precedent.<sup>283</sup> If a conflict between decisions of a former Fifth Circuit panel and a panel of the new court were to be treated as a genuine conflict between two panels of the same court, the en banc procedures of both the former Fifth Circuit and the new circuit would be engaged. A confrontation of two en banc courts might result, with the judges on one court comprising half the second court.<sup>284</sup> While such an occurrence is nearly

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280. The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.

United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting Maris, *supra* note 266, at 96). *But see* United States v. Mathies, 350 F.2d 963 (3d Cir. 1965). Of the cases decided on oral hearings in 1978, the Fifth Circuit decided thirty en banc and 822 in panel. Note, *supra* note 261, at 941.

281. Stare decisis requires that a precedent in a panel's own circuit control a conflicting precedent in another circuit. *See, e.g.*, St. Louis Sw. R.R. v. Tyler, 375 F.2d 938 (5th Cir. 1967); Ashe v. Commission, 288 F.2d 345 (6th Cir. 1961). Conflicts between circuits are for Supreme Court resolution. *See* S. Ct. R. 17(1)(a).

282. Reorganization Act, *supra* note 148, § 9; *see* text accompanying notes 151-55 *supra*.

283. Testing this conclusion by stretching assumptions, if a panel in each of the two new courts had decided the issue differently, the former Fifth Circuit panel would face the double bind with two conflicting precedents.

284. An even more absurd situation is theoretically possible, in which a former Fifth Circuit panel might not agree with either of two new court panels. The result would be a triple confrontation of en banc courts. Of course, such situations are unlikely to occur. Nevertheless, they explore the theory of precedent. A second problem inherent in having the former Fifth Circuit convene en banc would be the awkwardness of having a grande en banc



beyond the realm of possibility, it illustrates the notion that extending the rule of interpanel accord to panels of another circuit has a potential to create untoward tension in the intermediate tier of the federal court system.

Questions concerning the effect of precedents of the former Fifth Circuit in the new Fifth and Eleventh Circuits ought to be considered together. The two new courts of appeals stand in the same relation to the former Fifth Circuit; neither is any more nor less a continuation of the parent circuit. The numbering of the courts of appeals for the new circuits is completely irrelevant to the question of the applicability of former Fifth Circuit precedent. The 1972 Commission on Revision of the Federal Court Appellate System recommended that the Canal Zone, Louisiana, Mississippi, and Texas be formed into a new eleventh circuit and that Alabama, Florida, and Georgia be formed into a new fifth circuit.<sup>285</sup> Under the 1977 Senate Bill, the new fifth circuit would have covered the Canal Zone, Alabama, Florida, Georgia, and Mississippi, and the new eleventh circuit would have covered Louisiana and Texas.<sup>286</sup> The Reorganization Act labels the court of appeals for the Canal Zone, Louisiana, Mississippi, and Texas the new Fifth Circuit and calls the court of appeals for Alabama, Florida, and Georgia the new Eleventh Circuit.<sup>287</sup> The suggestion that the precedents of the former Fifth Circuit will be binding, if at all, on only the new court of appeals carrying the number five thus defies credulity. This would mean that between the 1972 Commission recommendation, the 1977 Senate Bill, and the 1980 Act, *stare decisis* flip-flopped, waxed, and waned.<sup>288</sup>

In determining the role of precedent in the newly divided circuits, the obvious first step is to consult precedent. Congress split one circuit into two courts of appeals in 1929,<sup>289</sup> and added a Tenth Circuit to the nine

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settle a conflict between two en banc courts. See Reavley, *supra* note 110, at 5-6; notes 127-28 *supra*.

285. *Commission on Revision*, *supra* note 91, at 232; see text accompanying notes 87-92 *supra*.

286. S. 11, 95th Cong., 2d Sess. (1977); see text accompanying notes 100-19 *supra*.

287. Reorganization Act, *supra* note 148, § 10.

288. The new Fifth Circuit has been defined to include Alabama, Florida, and Georgia under the 1972 Commission recommendation; the Canal Zone, Alabama, Florida, and Georgia under the 1977 Senate Bill; and the Canal Zone, Louisiana, Mississippi, and Texas under the Reorganization Act. It further defies credulity to argue that Congress decided to apply former Fifth Circuit precedents to the Panama Canal Zone on the basis of airline schedules, the ultimate reason for using the House version instead of the Senate version of the Reorganization Act. Compare S. 2830, 96th Cong., 2d Sess. (1980) with H.R. 7665, 96th Cong., 2d Sess. (1980). See *Hearing on H.R. 7665*, *supra* note 138, at 37. See also Brown, *supra* note 166, at 417.

289. While the circuit courts had limited appellate jurisdiction and were reorganized in 1801, 1802, 1837, and 1866, they were not then principally appellate courts and had not developed any significant independence in terms of precedent. See Appendix *infra*; text accompanying notes 23-59 *supra*. The circuit courts of appeals were created in 1891 for the existing circuits. Act of March 3, 1891, ch. 517, § 2, 26 Stat. 826, 826. See notes 60-69 *supra*. Thus, the first significant reorganization of the geographical lines of the circuit courts of appeals before the Reorganization Act occurred in 1929. The District of Columbia Circuit was added formally as a separate circuit in 1948. Act of June 25, 1948, Pub. L. No. 80-773,

existing courts of appeals by detaching six states from the Eighth Circuit.<sup>290</sup> Neither the 1929 statute nor its legislative history provides any significant clue to the role of preexisting Eighth Circuit precedent in the reconstituted Eighth Circuit and the newly created Tenth Circuit.<sup>291</sup> Following the congressional lead, the two courts of appeals involved seem to have largely ignored the question. The Eighth Circuit went about its business, following its prior precedent rather than that of the new Tenth Circuit.<sup>292</sup> The new Tenth Circuit generally followed preexisting Eighth Circuit precedent,<sup>293</sup> occasionally striking out on its own.<sup>294</sup> The dearth of court of appeals cases<sup>295</sup> considering this problem may be explained by

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§ 41, 62 Stat. 869, 870, *codifying* *Swift & Co. v. United States*, 276 U.S. 311 (1928). This was not a division of one court into two, but merely the recognition of the creation of a single court. *See id.* Reviser's Notes. Thus, the creation of the Tenth Circuit is the only similar legislative action. *See generally* Appendix *infra*.

290. Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346. The new Eighth Circuit included Arkansas, Iowa, Minnesota, North Dakota, and South Dakota. The new Tenth Circuit included Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. *Id.* Both circuits have remained geographically constant.

291. *Id.* The House and Senate Committee reports provide conflicting indications, stating that "[t]his bill will divide the eighth circuit into two circuits, thus *creating an additional circuit* . . . ." This seems to suggest that only the new Tenth Circuit was considered a creation, while the shrunken Eighth Circuit was deemed a continuation. Yet the committees also referred to the "new eighth circuit" and "new tenth circuit." H.R. REP. NO. 2464, 70th Cong., 2d Sess. 1, 3 (1929); S. REP. NO. 1843, 70th Cong., 2d Sess. 1, 3 (1929). *See also* *Hearings Before the House Committee on the Judiciary on H.R. 5690, H.R. 13567, H.R. 13757*, 70th Cong., 2d Sess. (1928-1929). For an account of the history of the Tenth Circuit as told through its judges, see Breitenstein, *The United States Court of Appeals for the Tenth Judicial Circuit*, 52 DEN. L.J. 9 (1975).

292. *See, e.g.,* *Adams v. Hagerott*, 34 F.2d 899 (8th Cir. 1929); *Barrett v. United States*, 33 F.2d 115 (8th Cir. 1929); *Beck v. United States*, 33 F.2d 107 (8th Cir. 1929).

293. *See, e.g.,* *Coyle v. United States*, 34 F.2d 399 (10th Cir. 1929); *Tiller v. United States*, 34 F.2d 398 (10th Cir. 1929); *Keaton v. Little*, 34 F.2d 396 (10th Cir. 1929); *Weicker v. Bromfield*, 34 F.2d 377 (10th Cir. 1929); *Morrison v. White*, 34 F.2d 244 (10th Cir. 1929). Other cases decided soon after the division suggest that the law of all of the courts of appeals was largely homogenous, indicating that the Eighth Circuit rule was the law in other courts of appeals. *See, e.g.,* *Hoffer Oil Corp. v. Carpenter*, 34 F.2d 589 (10th Cir. 1929); *Rishel v. McPherson County*, 34 F.2d 250 (10th Cir. 1929); *United States v. Jackson*, 34 F.2d 241 (10th Cir. 1929); *Tingley v. United States*, 34 F.2d 1 (10th Cir. 1929); *Wenner, Harris & Buck v. Equitable Trust Co.*, 33 F.2d 1023 (10th Cir. 1929); *Martin v. United States*, 33 F.2d 1022 (10th Cir. 1929).

294. *See, e.g.,* *Elmhurst Inv. Co. v. Commissioner*, 34 F.2d 390 (10th Cir. 1929); *Hough v. Atchison, T. & S.F. Ry.*, 34 F.2d 238 (10th Cir. 1929). *See also* *United States v. Golden*, 34 F.2d 367 (10th Cir. 1929); *Kansas City, Mo. v. Fairfax Drainage Dist.*, 34 F.2d 357 (10th Cir. 1929).

295. One district court case is worthy of mention. In *Thompson v. St. Louis-San Francisco Ry.*, 5 F. Supp. 785 (N.D. Okla. 1934), the district court noted a conflict of authorities between the Eighth Circuit and the Fifth Circuit, and chose to follow the Eighth Circuit on the basis of some pragmatic logic:

The Tenth Circuit Court of Appeals, which is controlling of this court, has not passed upon the question, and since there is a difference in the holdings of two Circuit Courts of Appeals, the question is properly for the United States Supreme Court, rather than for this court's determination. However, it is not difficult to decide that the ruling of the Eighth Circuit Court of Appeals is controlling of the decision of the question now before the court. This court was formerly a part of the Eighth Judicial Circuit, having become disengaged therefrom upon the creation of the Tenth Judicial Circuit. The decisions of the Eighth Judicial Circuit are binding upon this court in the absence of deci-

observing that neither the Tenth Circuit nor the Eighth Circuit has been committed strongly to the rule of interpanel accord.<sup>296</sup> The creation of the Tenth Circuit precedent, therefore, is inconclusive.

The Reorganization Act and its legislative history strongly suggest that the two new circuits are indeed new, and need not be bound by former Fifth Circuit precedents. Clearly, legislative intent controls in such matters.<sup>297</sup> The argument that Congress intended to create two completely autonomous circuits, independent from one another and from the former Fifth Circuit, is a convincing one.

First, consider the background of the split. The 1972 Commission on Revision of the Federal Court Appellate System, which precipitated the legislative effort creating two new circuits, expressed a disinclination toward general geographical reorganization, based on a concern that redrawing boundaries would somehow change the law in the affected circuits:

We have not recommended a general realignment of all circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, *relocation would take from the bench and bar at least some of the law now familiar to them*. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.<sup>298</sup>

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sions of the Tenth Circuit. It is proper to observe that the decision of the Eighth Circuit Court of Appeals, in *Newell v. Bryam*, supra, was rendered by Hon. Walter H. Sanborn, and concurred in by Hon. Robert E. Lewis, then a member of the Eighth Circuit Court of Appeals, and Hon. Orie L. Phillips, then a District Judge within the Eighth Circuit, but sitting as a member of the Eighth Circuit Court. Upon the creation of the Tenth Circuit Court of Appeals, Hon. Robert E. Lewis was designated as a member of the Tenth Circuit Court of Appeals, and is its senior Circuit Judge at this time. Hon. Orie L. Phillips was appointed a member of the Tenth Circuit Court of Appeals, and is now a member of that court. Thus, the Eighth Circuit Court of Appeals' decision was rendered by two of the present judges of the Tenth Circuit Court of Appeals, and in my opinion the decision is controlling of this court. However, I have no difficulty in following the decision as I consider it sound upon principle and the proper construction of the statute involved.

*Id.* at 789.

296. See *United States v. United States Vanadium Corp.*, 230 F.2d 646, 649 (10th Cir.), cert. denied, 351 U.S. 939 (1956) ("We feel that one panel of the court should not lightly overrule a decision by another panel."); *Omaha v. Omaha Elec. Light & Power Co.*, 255 F. 801, 805 (8th Cir. 1919) (applying rule by implication before division). These two courts of appeals rarely invoke the rule of interpanel accord. Compare the cases cited in notes 275-76 supra.

297. See cases collected in 21 C.J.S. *Courts* § 134, at 203 n.54 (1954). See generally text accompanying notes 173-91 supra. If "courts are less free in applying a statute than in dealing with case law," (E. LEVI, supra note 175, at 7) then courts ought to be less free in dealing with a legislative intent about case law.

298. *Commission on Revision*, supra note 91, at 228 (emphasis added). In discussing the

Additionally, a group of congressional leaders, Fifth Circuit judges, community leaders, and commentators opposed the various proposals for division out of a concern that such a division would undo or change the prevailing precedents in the court.<sup>299</sup> The Reorganization Act was passed against the background of these two concerns.

The plain language of the statute itself supports the argument that Congress intended to create two new circuits. The drafters of the Reorganization Act were careful to establish the identity and maintain the individuality of the former Fifth Circuit, new Fifth Circuit, and the Eleventh Circuit.<sup>300</sup> Congress continued to emphasize the autonomy of each court by assigning judges, authorizing places of holding court, and dispensing the docket.<sup>301</sup>

The legislative history of the Act further evinces this congressional intent. The statement of purpose contained in the House Report is conclusive:

*The purpose of the legislation is to divide the current Fifth Judicial Circuit into two new and autonomous circuits. The new Fifth will comprise the States of Louisiana, Mississippi and Texas, as well as the District of the Canal Zone. The new Eleventh will comprise the States of Alabama, Florida and Georgia.*

The goal of the legislation is to meet societal change and growing caseloads in the six States presently comprising the Fifth Circuit. It accomplishes this by providing the residents, attorneys and litigants who reside or litigate within those States with *a new Federal judicial structure* which is capable of meeting the clear mandates of our judicial system—the rendering of consistent, expeditious, fair and inexpensive justice. *The two new circuits will preserve and promote the vigor, integrity and independence of the illustrious parent court.*<sup>302</sup>

The Report also repeatedly describes the legislation as creating “two completely autonomous circuits,”<sup>303</sup> “two separate and autonomous circuits,”<sup>304</sup> “two new and autonomous circuits,”<sup>305</sup> and “two new circuits.”<sup>306</sup> Senator Heflin, who presented the Senate bill, described the

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Fifth Circuit proposal, the Commission referred to “two new courts: a *new* fifth circuit . . . and an eleventh circuit” and to “the *new* courts.” *Id.* at 232-33 (emphasis added). *But cf. id.* at 228 (referring to the “creation of [only] two new circuits” in proposing to split both the Fifth and Ninth Circuits).

299. This has been a recurring theme. *See* sources cited in notes 84, 90, 91, 100, 106, 110, 125, 138, 164-66 *supra*.

300. The Fifth Circuit already had reorganized itself into two divisions, administered separately and bound by precedents of each other. The Reorganization Act must have created some additional autonomy. *See* text accompanying notes 134-35 *supra*.

301. *See* note 160 *supra*.

302. H.R. REP. NO. 1390, *supra* note 138, at 1 (emphasis added). In its findings, the committee concluded “[t]he two new circuits will preserve and promote the vigor, integrity and independence of the parent court.” *Id.* at 9.

303. *Id.* at 2.

304. *Id.* at 6.

305. *Id.* at 6-7.

306. *Id.* at 9. The report describes the Fifth and Eleventh Circuits as “new” no fewer than ten times. *Id.* at 6-9. *But cf. id.* at 10 (letter from Congressional Budget Office seems to suggest only the Eleventh Circuit is new, while the Fifth Circuit is continued).

proposal as "divid[ing] the present fifth circuit into two separate circuits . . . the new fifth circuit . . . and . . . the eleventh circuit."<sup>307</sup> Senator Stennis, an original cosponsor of the bill, spoke of "a new fifth circuit" and a "new 11th circuit," and introduced a resolution of the Mississippi State Bar supporting the division of "the presently existing Fifth Circuit into two completely autonomous Judicial Circuits."<sup>308</sup> Senator DeConcini, a second cosponsor, described the bill as dividing the present court into "2 more manageable circuits, a *new* 5th circuit and the 11th circuit."<sup>309</sup> Senator Cochran, a member of the Judiciary Committee, referred to the "new circuits."<sup>310</sup> In the House, Representative Kastenmeier introduced the subcommittee's bill and explained that it would "divide the fifth judicial circuit of the United States into two circuits . . . the new fifth circuit . . . [and] the new 11th circuit."<sup>311</sup> He explained that the bill, which eventually was enacted, would create "a new judicial structure—two autonomous circuits."<sup>312</sup> He said, "It is my view that the two new circuits will preserve and promote the integrity and independence of the parent court. . . . I predict that the split of this great court will produce two equally distinguished offsprings."<sup>313</sup> The testimony before the House subcommittee was of a similar nature.<sup>314</sup>

Clearly the judges of the two new courts of appeals would violate the legislative intent of the Reorganization Act were they to attempt to make decisions of the former Fifth Circuit binding on their panels. Congress intended that the two new courts of appeals would spring forth full-grown, like Athena from the head of Zeus, and the former Fifth Circuit soon would pass from the scene. Congress neither intended nor designed that the Fifth Circuit merely would give birth to the Eleventh, or that the Fifth Circuit would be twice cloned.

Aside from the potential institutional conflicts between the surviving former Fifth Circuit and the two new circuits,<sup>315</sup> an absolute requirement that all panels of the two new courts adhere to former Fifth Circuit precedent would violate the mechanism of stare decisis in the two new courts. Even the compromise rule proposed earlier disrupts the notion of stare decisis in the context of the courts of appeals.<sup>316</sup> These approaches are objectionable, however, because of their binding nature. The problem of precedent may not be solved by a rigid application of stare decisis. The

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307. 126 CONG. REC. S7321 (daily ed. June 18, 1980).

308. *Id.* at S7321.

309. *Id.* at S7322 (emphasis added).

310. *Id.* But see *id.* (remarks of Sen. Baker, implying a single new court was proposed).

311. 126 CONG. REC. H10,187, H10,188 (daily ed. Oct. 1, 1980).

312. *Id.*

313. *Id.*

314. *Hearing on H.R. 7665, supra* note 138, at 6 (statement of Griffin B. Bell, on behalf of the ABA), 12 (testimony of Althea T.L. Simmons on behalf of the NAACP), 17 (remarks of Rep. Danielson), 26 (Circuit Judge Johnson as spokesman for Fifth Circuit Judicial Council), 26 (judges' petition for split).

315. See notes 282-84 *supra*.

316. See text accompanying note 241 *supra*. This is so to the extent that the panel of the new court is constrained from handling former Fifth Circuit precedent as merely persuasive.

hypothetical *Thomas v. Baker* may be cited a "precedent" for the proposition that neither a panel nor the en banc court in the new circuits can "hold" all former Fifth Circuit precedents binding on panels of the new court.<sup>317</sup> Thus, the remaining judicial option is a policy-level consensus.<sup>318</sup> Because such an important policy should not be established at the panel level, the en banc courts in the new circuits are the more appropriate forums for such a pronouncement.<sup>319</sup> The en banc courts must decide rationally and then articulate their rationale.

The en banc courts should reject an absolute approach that would make former Fifth Circuit precedent binding on their panels. While one component of stare decisis is the deference of a court for its own prior decisions,<sup>320</sup> the legislative history of the Reorganization Act suggests that this is not a relevant concern. Congress apparently intended the two new courts of appeals to be autonomous and independent, one from another and each from the former Fifth Circuit.<sup>321</sup> This unique situation involves a determination of the precedential impact in two new courts of case law from a predecessor court. The rationale for stare decisis itself provides a framework for analyzing the analogous, though unique, question presented.

Judge Jerome Frank catalogued five general policy arguments advanced in support of the doctrine of stare decisis.<sup>322</sup> Application of these rationales to the unique situation in the two new circuits obviates the use of an absolute approach. Justice, the first rationale, requires that the court apply to a second set of parties in a second case the same rule it had applied in a prior case.<sup>323</sup> Because the new Fifth and new Eleventh Circuits are independent and autonomous, they have not applied any rule to any parties in any prior cases.<sup>324</sup> No good reason appears to require the panels of the new courts to perpetuate error, and a panel should be as free to determine error in former Fifth Circuit case law as in any persuasive authority. A second argument for stare decisis is the need for stability,<sup>325</sup> a need based principally on the notion that individuals rely upon case law. An absolute rule would serve this criterion, although at the cost of perpetuating some injustice. As an alternative to an absolute approach, a panel of the new

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317. See text accompanying 270-77 *supra*.

318. See notes 192-96 *supra*.

319. See notes 224-30 *supra*.

320. See Wise, *supra* note 220, at 1043-44.

321. See text accompanying notes 297-314 *supra*. The application of the rule of interpanel accord also might violate FED. R. APP. P. 35, which allows for en banc review only when "necessary to secure or maintain uniformity" or in cases of "exceptional importance." Application of the rule would not be necessary to maintain uniformity within the two new circuits. That the new en banc courts may differ with the former Fifth Circuit in unimportant cases also is likely. Convening an en banc court in such circumstances could violate the spirit of rule 35. See *United States v. Rosciano*, 499 F.2d 173 (7th Cir. 1974); *United States v. Lewis*, 475 F.2d 571 (5th Cir. 1972).

322. J. FRANK, *supra* note 198, at 267-71.

323. *Id.* at 267-68.

324. Nowhere here is it suggested that the new Fifth and the new Eleventh Circuits should not adopt the rule of interpanel accord with respect to their own panel decisions.

325. J. FRANK, *supra* note 198, at 268-71.

court with authority to overrule former Fifth Circuit precedents could consider the extent of actual reliance on such precedents and determine separately whether to apply the new ruling prospectively only.<sup>326</sup> A third rationale for stare decisis is its contribution to the "beauty and symmetry" of the common law.<sup>327</sup> As a general proposition, Frank rejects this notion of aesthetics as "ridiculous."<sup>328</sup> It seems even more ridiculous and somewhat illogical to suggest that the symmetry of the law of the former Fifth Circuit should remain intact after two new courts have replaced it.

Another argument in favor of stare decisis suggests that completely ad hoc decisions make the law "unknowable" and prevent members of the legal profession from acquiring and trading in a knowledge of the law.<sup>329</sup> Surely, an attorney does not have a vested interest in bad law, whatever professional stake there is in hard cases. An absolute rule would be an overbroad means toward achieving this goal. A flexible approach would permit room for even more lawyering, in order to convince the new circuit to turn its back on the law of the former Fifth Circuit.

Frank's final argument for stare decisis is simply "convenience of the judges," for it is easier to adjudicate in a settled system.<sup>330</sup> For the new courts to follow the former Fifth Circuit precedents would be simple, predictable, and such a practice would be convenient for the judges. Nevertheless, this argument, however appealing, cannot sustain the administration of injustice.<sup>331</sup> The cost of preventing the new courts from overruling a wrong decision seems too expensive in terms of perpetuating any error. Also, requiring the cumbersome en banc procedure in every instance would be inconsistent with the convenience rationale.<sup>332</sup>

On a policy level, the rule that a court should defer to its own prior decisions is irrelevant to the predicament of the new Eleventh and new Fifth Circuits. Without some overreaching reason for departure, the general rule already applicable in decisions between two courts of appeals should apply.<sup>333</sup> While the decision of another court of appeals is not

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326. *Id.* at 270.

327. *Id.* at 271.

328. *Id.*

329. *Id.*; see note 168 *supra*.

330. J. FRANK, *supra* note 198, at 271.

331. *Id.*

332. Moving from justification to explanation, Frank suggests that the foremost reason for the precedent system is habit, a specific form of the human condition of general, inevitable inertia. *Id.* at 271-74. A less than absolute rule would allow habit much sway. In the absence of any serious contention that habit should be exalted over all else, this is enough.

333. To require the new Eleventh and new Fifth Circuits to apply the stare decisis of the former Fifth Circuit would be not unlike the approach in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See note 186 *supra*. That decision, however, was based on overarching concerns of federalism and comity between national and state court systems as inscribed in the First Judiciary Act and, perhaps, the Constitution. C. WRIGHT, *supra* note 187, §§ 55-56. See generally Harnett & Thornton, *Precedent in the Erie-Tompkins Manner: A Decade in Retrospect*, N.Y.U.L.Q. 770 (1949); Note, *The Constitutional Power of Congress to Control Procedure in the Federal Courts*, 56 NW. L. REV. 560 (1961); Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 511 (1952). Based on such weighty concerns, the *Erie* decision "revived the doctrine of stare decisis and [gave] it a setting that it never before had." E. PATTERSON, *supra*

otherwise controlling authority, in the absence of its own precedents a court will defer to the persuasiveness of precedent from other circuits unless it is deemed manifestly erroneous.<sup>334</sup> The absolute rule of interpanel accord should not be applied between two independent and autonomous circuits.<sup>335</sup> The congressional failure to take positive action to make former Fifth Circuit case law binding<sup>336</sup> and apparent intention to constitute separately the two new courts of appeals strengthens the argument for this approach.<sup>337</sup>

The absolute rule of stare decisis suffers from its own ephemeral character. Professor Gilmore defined the doctrine as "the idea that a court is bound, in deciding a current case, to follow its own past decisions in 'like' cases. Which current cases are 'like' which past cases is a point on which opposing counsel tend to disagree."<sup>338</sup> Distinguishing Fifth Circuit holding from Fifth Circuit dictum is a difficult task for any court, and one often incapable of satisfactory performance. The absolute rule of stare decisis based on this false and formalistic distinction denigrates substance in the process.<sup>339</sup> The classic tradition of stare decisis has much more flexibility than an absolute rule would recognize.<sup>340</sup>

The specific policy underlying the rule of interpanel accord is an attempt to further the concept of the law of the circuit, which requires uniformity in the application of the law by a court.<sup>341</sup> Because the court is comprised of numerous judges, sitting in many different multiples of three, some mechanism for maintaining one voice, the voice of the majority of the judges, is necessary. Applying the rule of interpanel accord across circuit

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note 198, § 3.30, at 304. The *Erie* doctrine requires the deciding federal court to follow state court precedent without permitting the traditional overruling mechanism. Only for very good reasons should a court be required to determine "what the rule of *stare decisis* means with enough precision to apply it without the traditional safety valve, the authority of courts to create law interstitially." *Id.* No such weighty concerns are inherent in the division of the Fifth Circuit. *See id.* § 3.33, at 320-24. The two new courts would not have available the certification procedure provided by many states to certify questions to the former Fifth Circuit. *See, e.g.,* Adam, George, Lee, Schulte & Ward v. Westinghouse, 597 F.2d 570, 576-77 n.2 (5th Cir. 1979) (Hill, J., dissenting, would have certified the state law question the majority decided).

334. H. BLACK, LAW OF JUDICIAL PRECEDENTS § 103, at 333 (1912). *See, e.g., In re Eartherton*, 271 F.2d 199 (8th Cir. 1959).

335. If, as some suggest, the rule of interpanel accord makes no sense within a circuit, then its application between two autonomous circuits would be nonsensical. *See Speigner v. Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076 (1980).

336. *See* text accompanying notes 174-91 *supra*.

337. *See* text accompanying notes 297-314 *supra*.

338. G. GILMORE, THE AGES OF AMERICAN LAW 130-31 n.32 (1971).

339. For example, footnote 7 in *United States v. Burns*, 597 F.2d 939, 943-44 n.7 (5th Cir. 1979), a self-proclaimed dictum, is the most significant aspect of the case. The castigation of prosecutorial overzealousness in Part III.A. of the opinion in *United States v. Wilson*, 578 F.2d 67, 71-72 (5th Cir. 1978), albeit a dictum, is of much more lasting significance than the holding.

340. *See generally* H. BLACK, *supra* note 334; J. WELLS, RES ADJUDICATA AND STARE DECISIS (1879). The amount of flexibility inherent in the principle of stare decisis is the subject of great debate. *Compare, e.g.,* K. LLEWELLYN, *supra* note 198, with J. FRANK, *supra* note 198, with Wise, *supra* note 220.

341. Uniformity in decisionmaking was a key concern in the congressional decision to divide the Fifth Circuit. *See* H.R. REP. NO. 1390, *supra* note 138, at 3.



lines, however, would frustrate one underlying institutional value of this component of stare decisis, control of the law of the circuit. The rule of interpanel accord would require the panels of the two new circuits to follow a rule of law presumably established by a judicial majority of another circuit. While the judges in the new circuits initially will be former Fifth Circuit judges, with time that will change.<sup>342</sup> The majority of the judges on both new courts would be deprived of the opportunity to implement its views efficiently by means of a representative panel decision whenever a former Fifth Circuit precedent exists.<sup>343</sup>

Applying the rule of interpanel accord across circuit lines also fails to advance the underlying institutional value of stare decisis, that of maintaining uniformity among panel decisions. The first decision on an issue in the new circuit will establish the precedent to be followed; subsequent panel decisions must be uniform with that initial decision. Requiring the first decision to be consistent with former Fifth Circuit precedent does not achieve uniformity within the new circuit. The requirement does promote some stability in the law between old and new circuits. This stability, as opposed to uniformity, is evanescent, however, because the new circuit's en banc court can overrule the former court's precedent.<sup>344</sup>

A rigid and absolute policy approach to the application of former Fifth Circuit precedent therefore does not withstand scrutiny. While there is no question that the law of the former Fifth Circuit should be deemed uniquely persuasive for a time, no sufficiently weighty policy justification exists for requiring panels of the new courts to determine what the rule of former Fifth Circuit stare decisis means with enough precision to follow it, but without the authority to create law interstitially.<sup>345</sup>

#### IV.

The issues addressed here are important ones. As the courts of appeals assume a greater role in developing the law of the land, the body of that law will grow, and more significant differences between the law of the circuits will develop. As Congress continues its preoccupation with the intermediate tier of the federal courts, more redrawing of boundaries doubtless will be considered. In the future, Congress should legislate with respect to the viability of precedents across redrawn boundary lines. Today, without an express congressional edict, the new Fifth Circuit and the new Eleventh Circuit must decide which choice to make and how to make it.<sup>346</sup>

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342. In fact, most of the judges in each new circuit have been appointed so recently that their interest in the former Fifth Circuit precedents is inherited. President Carter appointed 7 of 12 judges on the new Eleventh Circuit and 8 of 14 judges on the new Fifth Circuit. *Hearing on H.R. 7665, supra* note 138, at 59-62.

343. If there is a former precedent from any other circuit, however, the panel may disagree. *See* notes 275-76 *supra*.

344. The compromise rule would interfere with these same values in a similar manner, although to a lesser extent. *See* text accompanying notes 239-49 *supra*.

345. E. PATTERSON, *supra* note 198, § 3.30, at 304.

346. The new circuits should develop new rules for the courts in a formal, public manner. *See* Weinstein, *supra* note 232, at 963-64. *See also* Roney, *The Bar Answers the Chal-*

This Article raises more questions than it answers, which is the luxury of commentators. Part of the responsibility of judging is to answer hard questions such as these. To end this Article as it began, with the words of a great judge: "We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present, the path of safety is found."<sup>347</sup>

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*lenge*, 62 A.B.A.J. 60, 64 (1976) (quoting ABA Proposal, "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press").

347. B. CARDOZO, *supra* note 198, at 160. *See also* A. FRANTZ, *HOW COURTS DECIDE* 63-64 (1968).

APPENDIX  
(Chronological Table of Federal Circuits\*)

Circuits	Act of Sept. 24, 1789, Ch. 20, 1 Stat. 73	Circuits	Act of Feb. 13, 1801, Ch. 4, 2 Stat. 89	Circuits	Act of April 29, 1802, Ch. 31, 2 Stat. 156	Circuits	Act of Mar. 3, 1837, Ch. 34, 5 Stat. 176
Eastern	Conn. Mass. N.H. N.Y. R.I. <sup>1</sup> Vt. <sup>2</sup>	1.	Me. Mass. N.H. R.I.	1.	Me. <sup>4</sup> Mass. N.H. R.I.	1.	Me. Mass. N.H. R.I.
		2.	Conn. N.Y. Vt.	2.	Conn. N.Y. Vt.	2.	Conn. N.Y. Vt.
Middle	Del. Md. N.J. Pa. Va.	3.	Del. N.J. Pa.	3.	N.J. Pa.	3.	N.J. Pa.
		4.	Md. Va.	4.	Del. Md.	4.	Del. Md.
Southern	Ga. N.C. <sup>3</sup> S.C.	5.	Ga. N.C. S.C.	5.	N.C. Va.	5.	N.C. <sup>10,13</sup> Va. <sup>13</sup>
		6.	Ky. Ohio <sup>6</sup> Tenn.	6.	Ga. S.C. <sup>10</sup>	6.	Ga. <sup>10</sup> S.C. <sup>10</sup>
Independent Districts	Ky. <sup>4</sup> Me. <sup>4</sup> Tenn. <sup>5</sup>			7.	Ky. <sup>6,7</sup> Ohio <sup>6</sup> Tenn. <sup>6,7</sup>	7.	Ill. <sup>11,18</sup> Ind. <sup>11,17</sup> Mich. <sup>6,18</sup> Ohio <sup>6,17</sup>
				Independent Districts	Ala. <sup>8</sup> Ark. <sup>8</sup> Ill. <sup>8</sup> Ind. <sup>8</sup> La. <sup>8</sup> Mich. <sup>6,8</sup> Miss. <sup>8</sup> Mo. <sup>8</sup>	8.	Ky. <sup>16</sup> Mo. <sup>19</sup> Tenn. <sup>16</sup>
						9.	Ala. <sup>9</sup> Ark. <sup>16</sup> La. <sup>9,16</sup> Miss. Wis. <sup>11,18</sup>
						10.	Cal. <sup>12</sup> Nev. <sup>13</sup> Ore. <sup>12</sup>
						Independent Districts	Fla. <sup>8</sup> Iowa <sup>8,19</sup> Kan. <sup>8,19</sup> Minn. <sup>8,19</sup> Tex. <sup>8,16</sup>

\* Adapted from Chronological Table, 1 Fed. Cas. x-xi (1894).

APPENDIX  
(Continued)

Circuits	Act of July 23, 1866, Ch. 210, 14 Stat. 209	Circuits	Act of Mar. 3, 1891, 26 Stat. 826	Circuits	Act of Feb. 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346	Circuits	Act of Oct. 14, 1980, 94 Stat. 1994
1.	Me. N.H. Mass. R.I.	1.	Me. N.H. Mass. R.I.	1.	Me. P.R. <sup>20</sup> Mass. R.I.	1.	Me. P.R. Mass. R.I.
2.	Conn. Vt. N.Y.	2.	Conn. Vt. N.Y.	2.	Conn. Vt. N.Y.	2.	Conn. Vt. N.Y.
3.	Del. Pa. N.J.	3.	Del. Pa. N.J.	3.	Del. Pa. N.J. V.I. <sup>21</sup>	3.	Del. Pa. N.J. V.I.
4.	Md. Va. N.C. W. Va. S.C. <sup>10</sup>	4.	Md. Va. N.C. W. Va. S.C.	4.	Md. Va. N.C. W. Va. S.C.	4.	Md. Va. N.C. W. Va. S.C.
5.	Ala. La. Fla. Miss. <sup>15</sup> Ga. Tex.	5.	Ala. La. Fla. Miss. Ga. Tex.	5.	Ala. La. C.Z. <sup>22</sup> Miss. Fla. Tex. Ga.	5.	C.Z. Miss. La. Tex.
6.	Ky. Ohio Mich. Tenn.	6.	Ky. Ohio Mich. Tenn.	6.	Ky. Ohio Mich. Tenn.	6.	Ky. Ohio Mich. Tenn.
7.	Ill. Wis. Ind.	7.	Ill. Wis. Ind.	7.	Ill. Wis. Ind.	7.	Ill. Wis. Ind.
8.	Ark. <sup>15</sup> Mo. Colo. <sup>13</sup> Neb. <sup>13</sup> Iowa N.D. <sup>13</sup> Kan. S.D. <sup>13</sup> Minn. Wyo. <sup>13</sup>	8.	Ark. Mo. Colo. Neb. Iowa N.D. Kan. S.D. Minn. Wyo.	8.	Ark. Neb. Iowa N.D. Minn. S.D. Mo.	8.	Ark. Neb. Iowa N.D. Minn. S.D. Mo.
9.	Alaska <sup>14</sup> Nev. Cal. Ore. Idaho <sup>13</sup> Wash. <sup>13</sup> Mont. <sup>13</sup>	9.	Alaska <sup>14,23</sup> Nev. Idaho Ore. Mont. Wash.	9.	Alaska Mont. Ariz. <sup>25</sup> Nev. Cal. Ore. Hawaii <sup>24</sup> Wash. Idaho	9.	Alaska Idaho Ariz. Mont. Cal. Nev. Guam <sup>29</sup> Ore. Hawaii
				10.	Colo. <sup>28</sup> Okla. <sup>26</sup> Kan. <sup>28</sup> Utah <sup>28</sup> N.M. <sup>27,28</sup> Wyo. <sup>28</sup>	10.	Colo. Okla. Kan. Utah N.M. Wyo.
						11.	Ala. Ga. Fla.
						D.C.	Dist. of Col. <sup>30</sup>

## NOTES TO APPENDIX

1. Rhode Island was added to the eastern circuit by Act of June 23, 1790, ch. 21, 1 Stat. 128.
2. Vermont was added to the eastern circuit by Act of March 2, 1791, ch. 12, 1 Stat. 197.
3. North Carolina was added to the southern circuit by Act of June 4, 1790, ch. 17, 1 Stat. 126.
4. Circuit court powers were conferred upon the district courts of the independent districts of Maine and Kentucky by Act of September 24, 1789, ch. 20, 1 Stat. 73. By Act of March 30, 1820, ch. 27, 3 Stat. 554, Maine was added to the first circuit.
5. Circuit court powers were conferred upon the district courts of Tennessee by Act of January 31, 1797, ch. 2, 1 Stat. 496.
6. By Act of February 24, 1807, ch. 16, 2 Stat. 420, Ohio, Kentucky, and Tennessee constituted the seventh circuit. By Act of January 28, 1863, ch. 13, 12 Stat. 637, Ohio and Michigan constituted the seventh circuit.
7. Kentucky and Tennessee were made independent districts by Act of April 29, 1802, ch. 31, 2 Stat. 156.
8. Circuit court powers were conferred upon the district courts of the following independent districts: Louisiana by Act of April 8, 1812, ch. 50, 2 Stat. 703; Indiana by Act of March 3, 1817, ch. 100, 3 Stat. 390; Mississippi by Act of April 2, 1818, ch. 29, 3 Stat. 413; Illinois by Act of March 3, 1819, ch. 70, 3 Stat. 502; Alabama by Act of April 21, 1830, ch. 47, 3 Stat. 564; Missouri by Act of March 16, 1822, ch. 12, 3 Stat. 653; Arkansas by Act of June 15, 1836, ch. 100, 5 Stat. 50; Michigan by Act of July 1, 1835, ch. 234, 5 Stat. 62; Florida by Act of March 3, 1845, ch. 75, 5 Stat. 788; Iowa by Act of March 3, 1845, ch. 76, 5 Stat. 789; Texas by Act of December 29, 1845, ch. 1, 9 Stat. 1; Minnesota by Act of May 11, 1858, ch. 31, 11 Stat. 285; and Kansas by Act of January 29, 1861, ch. 20, 12 Stat. 128.
9. Alabama and Louisiana constituted the fifth circuit by Act of August 16, 1842, ch. 180, 5 Stat. 507.
10. North Carolina, South Carolina, and Georgia constituted the sixth circuit by Act of August 16, 1842, ch. 180, 5 Stat. 507. South Carolina was divided into the eastern and western districts by Act of February 21, 1825, ch. 11, 3 Stat. 726. Circuit court powers were conferred upon the district court for the western district by Act of August 16, 1856, ch. 119, 11 Stat. 43. A circuit for the western district was established by Act of February 6, 1889, ch. 113, 25 Stat. 655. Terms for the circuit court for the districts of South Carolina were regulated by Act of April 26, 1890, ch. 165, 26 Stat. 71.
11. Indiana, Illinois, and Wisconsin constituted the eighth circuit by Act of January 28, 1863, ch. 131, 12 Stat. 637. Wisconsin was transferred to the ninth circuit by Act of February 9, 1863, 12 Stat. 648.
12. California constituted a separate circuit by Act of March 2, 1885, ch. 142, 10 Stat. 631 and, with Oregon, constituted the tenth circuit by Act of March 3, 1863, ch. 100, 12 Stat. 794.
13. Virginia was added to the fourth circuit by Act of August 16, 1842, ch. 180, 5 Stat. 507. Nevada was added to the tenth circuit by Act of February 27, 1865, ch. 64, 13 Stat. 440. North Carolina was added to the fourth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576. Nebraska was added to the eighth circuit by Act of March 25, 1867, ch. 7, 15 Stat. 5. Colorado was added to the eighth circuit by Act of June 26, 1876, ch. 147, 19 Stat. 61. Montana was added to the ninth circuit by Act of February 22, 1889, ch. 180, 25 Stat. 682. North Dakota and South Dakota were added to the eighth circuit by Act of February 22, 1889, ch. 180, 25 Stat. 682. Washington was added to the ninth circuit by Act of February 22, 1889, ch. 180, 25 Stat. 682. Idaho was added to the ninth circuit by Act of July 3, 1890, ch. 656, 26 Stat. 217. Wyoming was added to the eighth circuit by Act of July 10, 1890, ch. 664, 26 Stat. 225.
14. Certain circuit court powers were conferred on the district courts of Alaska and writs of error in criminal cases were authorized to issue from the circuit court for the district of Oregon to the district court of Alaska by Act of May 17, 1884, ch. 53, 23 Stat. 24.
15. Circuit courts were established in Arkansas and Mississippi by Act of February 6, 1889, ch. 113, 25 Stat. 655.
16. Louisiana, Texas, Arkansas, Kentucky, and Tennessee constituted the sixth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.

17. Ohio and Indiana constituted the seventh circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.
18. Michigan, Wisconsin, and Illinois constituted the eighth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.
19. Missouri, Iowa, Kansas, and Minnesota constituted the ninth circuit by Act of July 15, 1862, ch. 178, 12 Stat. 576.
20. Puerto Rico was added to the First Circuit by Act of January 28, 1915, ch. 22, 38 Stat. 803.
21. The Virgin Islands were added to the Third Circuit by Act of February 13, 1925, ch. 229, 43 Stat. 936.
22. The district of the Canal Zone was added to the Fifth Circuit by Act of February 13, 1925, ch. 229, 43 Stat. 936.
23. Decisions of the district courts in Alaska were made reviewable in the Ninth Circuit Court of Appeals by Act of February 13, 1925, ch. 229, 43 Stat. 936.
24. Hawaii was included in the Ninth Circuit by Act of March 3, 1911, ch. 231, 36 Stat. 1131.
25. Arizona was included in the Ninth Circuit by Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.
26. Oklahoma was included in the Eighth Circuit by Act of March 3, 1911, ch. 231, 36 Stat. 1131.
27. New Mexico was included in the Eighth Circuit by Act of March 4, 1921, ch. 149, 41 Stat. 1361.
28. Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico constituted the Tenth Circuit Court of Appeals by Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.
29. Guam was added to the Ninth Circuit by Act of October 31, 1951, Pub. L. No. 82-248, 65 Stat. 723.
30. The Court of Appeals for the District of Columbia Circuit was recognized as a separate circuit by Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 870.